RECORD, CASE No. 13,389.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 270.

F. L. UNDERWOOD; JESSE N. JOHNSON, ADMINISTRATOR OF A. H. JOHNSON, DECEASED; AND R. F. CRAWFORD, APPELLANTS,

vs.

THE METROPOLITAN NATIONAL BANK OF THE CITY OF NEW YORK, JOHN J. MASTIN, AND THOMAS H. MASTIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED OCTOBER 19, 1888.

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INDEX.

		Original.	Print.
Citation	(omitted in printing)	*a*	—
Proof of service of citation	"	*b*	—
Order filing bill and granting subpœna	"	1	—
Bill of complaint	"	1	—
Subpœna	"	116	—
Marshal's return	"	117	—
Subpœna	"	118	—
Marshal's return	"	119	—
Appearance of Kersey Coates, assignee, &c.	"	119	—
Henry Kahn	"	120	—
Johnson County savings bank	"	120	—
John Murray	"	121	—
Elijah Gates	"	121	—
A., T. & S. F. R. R. Co.	"	121	—

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1891.

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Citation	(omitted in printing)	a	—
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Order filing bill and granting subpœna	"	1	—
Bill of complaint	"	1	—
Subpœna	"	116	—
Marshal's return	"	117	—
Subpœna	"	118	—
Marshal's return	"	119	—
Appearance of Kersey Coates, assignee, &c.	"	119	—
Henry Kahn	"	120	—
Johnson County savings bank	"	120	—
John Murray	"	121	—
Elijah Gates	"	121	—
A., T. & S. F. R. R. Co.	"	121	—

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1891.

	Original.	Print.
Appearance of Bates County National bank *et al.*, (omitted in printing)	122	—
George W. Jones *et al.* (omitted in printing)	122	—
Order filing answer of A., T. & S. F. R. R. Co. "	123	—
Answer of A., T. & S. F. R. R. Co. "	123	—
Appearance of Nathan E. Harrelson *et al.* "	123	—
Exchange Bank of Breckenridge, Mo., *et al.*, (omitted in printing)	124	—
Answer of Elijah Gates *et al.* (omitted in printing)	125	—
Order filing answers and reply "	128	—
Reply to answer of Gates *et al.* "	128	—
Answer of Adam and John Long "	129	—
James A. Bryant "	132	—
Order filing answer of Dickinson *et al.* "	135	—
Answer of M. H. Dickinson *et al.* "	135	—
Order filing disclaimer of Bigelow & Shaw "	138	—
Disclaimer of Bigelow & Shaw "	138	—
Order filing answer of Kahn "	139	—
Answer of Henry Kahn "	139	—
Deed, Mastin *et ux.* to Kahn, Sept. 7, 1878. "	143	—
Order as to time to take testimony, &c. "	145	—
Stipulation as to time to take testimony, &c. "	145	—
Order filing reply "	147	—
Reply to answers of Dickinson *et al.* "	147	—
Order of dismissal as to defendant Cahn "	148	—
Withdrawal of appearance for Kersey Coates. "	148	—
Stipulation substituting attorneys for complainant, (omitted in printing)	149	—
Order filing answer of J. J. and T. H. Mastin, &c., (omitted in printing)	149	—
Answer of J. J. Mastin and Thomas H. Mastin, (omitted in printing).	150	—
Exhibit A—Statement of notes held by the Metropolitan National bank and returned to Coates, assignee, on April 17, 1879, without consideration, (omitted in printing).	181	—
B—Agreement between John J. Mastin & Co. and the Metropolitan National bank, October 8, 1878, &c., (omitted in printing)	181	—
Stipulation as to filing pleadings, &c. (omitted in printing)	183	—
Order filing cross-bill, &c.	184	1
Cross-bill.	184	1
Exhibit A—Statement of notes held by the Metropolitan National bank and returned to Coates, assignee, on April 17, 1879, without consideration	208	15
B—Agreement between John J. Mastin & Co. and the Metropolitan National bank, October 8, 1888, &c.	209	15
Order filing supplemental bill and replications	210	16
Supplemental bill	211	17
Replication to answer of J. J. and T. H. Mastin	212	17
Replication to answer of J. J. and T. H. Mastin	213	18
Order filing answer and demurrer to cross-bill	214	19
Answer to cross-bill	214	19
Demurrer to cross-bill	219	22
Order filing replication to answer to cross-bill	220	22

	Original.	Print.
Replication to answer to cross-bill	221	23
Order filing answer of Underwood *et al.*	222	24
Answer of F. L. Underwood *et al.*	222	24
Stipulation as to evidence, &c.	232	30
Order taking cause under advisement	235	31
Answer of John J. and Thomas H. Mastin	235	31
Exhibit A—Quitclaim deed from the Metropolitan National bank to John J. and Thomas H. Mastin, May 18, 1886	242	35
B—Deed of mortgage from John J. Mastin *et ux.* and Thomas H. Mastin *et ux.* to the Metropolitan National bank, June 7, 1878	246	38
Replication to answer of John J. and Thomas H. Mastin	252	41
Opinion	253	42
Decree of April 2, 1887	257	44
Decree of May 18, 1888	257	44
Evidence	259	44
Testimony of J. V. C. Karnes	259	45
Further statement	281	57
Record in Metropolitan National Bank vs. Johnson *et al.*	283	58
Complaint	283	58
Answer of Quinlan *et al.*	285	59
Judgment of dismissal	288	61
Testimony of R. F. Crawford	289	61
C. C. Quinlan	298	66
Exhibit A—Protest of note of Johnson & Crawford of July 18, 1878, &c.	301	68
B—Protest of certificate of deposit of Mastin bank of July 18, 1878, &c.	305	70
Testimony of F. L. Underwood	310	73
Exhibit A—Statement of F. L. Underwood, October 22, 1880	312	74
Agreement between Metropolitan National bank and F. L. Underwood, October 20, —	313	75
Testimony of Thomas H. Mastin	316	76
John J. Mastin	326	82
Order allowing appeal	333	86
Appeal bond	334	86
Clerk's certificate	337	88
Stipulation as to omitting parts of record in printing	338	88
Mortgage from John J. Mastin *et ux.* and Thomas H. Mastin *et ux.* to the Metropolitan National bank, June 7, 1878	339*a*	89
Stipulation specifying parts of record to be omitted in printing	346	95

* * * * * * *

1-184 And afterwards, on said 4th day of January, 1886, the following entry appears of record:

JOHN J. MASTIN *et al.*
against
METROPOLITAN NAT. B'K. } 1080.

This day come complainants, by their solicitor, T. A. F. Jones, and file cross-bill of complaint herein against defendant; thereupon comes defendant, by Messrs. Pratt, Brumback and Ferry, its solicitors, and enters appearance.

Said cross-bill is in words and figures as follows:

To the judges of the circuit court of the United States for the western division of the western district of Missouri:

John J. Mastin and Thomas H. Mastin, of Kansas City, Missouri, bring this their cross-bill against the Metropolitan National Bank of the City of New York, of the county of New York and State of New York, a corporation organized under the laws of the United States and a citizen and resident of the State of New York and the city of New York and the county of New York; and thereupon your orators complain and say—

1. That the defendant did on the — day of ——, 1879, file *his* bill in this honorable court against your orators and
185 divers other persons, to wit, —— ——, setting up that in the year 1878 your orators executed to the defendant a mortgage upon certain lands in the State- of Missouri and Kansas to secure all notes, drafts, and bills sold and endorsed or that might thereafter be sold and endorsed to the defendant by the Mastin Bank of Kansas City, Missouri, and that certain notes so sold and endorsed to the defendant by the said Mastin bank (describing the said notes) had not been paid, and thereupon prays that an account may be taken of what is due the defendant of principal and interest and damages under said mortgage, and that your orators be decreed to pay to the defendant what should be found due, with the costs of *his* suit, or in default thereof be barred and foreclosed of and from all right and equity of redemption in and to the mortgage- premises.

That your orators say that the said mortgage and the notes thereby secured were a part of and connected with other business dealings and transactions between the defendant and your orators, which extend over a period of many years and are of an intricate and complicated character; that both before and since the filing of the defendant's said bill large sums of money have been paid to the defendant in the course of the said business dealings and transactions which the defendant should have applied to the payment of said notes secured by the said mortgage, and since the filing of the said bill large sums of money have been paid to the defendant by

the makers of the said notes and by Kersey Coates, assignee of the said Mastin bank, which defendant should have applied to the payment of the said notes, but the defendant has not in either case so applied or credited the said payments, and that your orators
186 are entitled in equity and good conscience to various credits and offsets against the defendant in respect of the demand of the defendant against your orators on account of said notes; that the accounts between your orators and defendants growing out of their said business dealings and transactions are still open and unsettled, but if said accounts were properly taken and the various credits and offsets to which your orators are fairly entitled were allowed it would not only appear that all the liabilities of your orators to defendant on account of said notes *was* long since paid off and discharged, but a considerable balance would be coming from defendant to your orators; and your orators say that they have made hereinafter a complete statement of said business dealings and transactions between defendant and your orators and of the said various credits and offsets which your orators claim against defendant in respect to said notes.

And thereupon your orators say that on the 7th day of June, 1878, defendant was and for a long time prior thereto had been one of the New York correspondents of the Mastin bank, a corporation organized under the laws of Missouri and carrying on a banking business at Kansas City, Missouri, and the said Mastin bank was in the habit of selling to defendant notes which it had discounted for its own customers, and your orators, who were largely interested in the said Mastin bank as stockholders, were in the habit of endorsing, as accommodation endorsers, the notes so sold to defendant, and on the 7th day of June, 1878, your orators, for the purpose of giving further security for the payment of all such notes at that time sold or thereafter to be sold by the said Mastin bank to defendant, executed in favor of the defendant a mortgage (being
187 the same mortgage sought to be foreclosed in said defendant's bill) upon certain lands in the State of Missouri and county of Jackson belonging to your orators individually and described as follows, to wit:

Forty (40) feet *from* on Fourth street by ninety (90) feet deep off the east end of lots 148 and 149, in block 15, old town, and lot 250, in block 26, old town, except 24 feet off the east and 24 feet off the south side- and 24 feet by 142 feet off the south side of the north 48 feet of lot 165, in block 17, old town; also 15 feet off the north side of lot 64 and all of lot 65, in block 12, Hubbard's addition, and lots 6, 7, 8, 9, and 10, in block 2, Hubbard's addition; also lots 526, 527, 528, 529, 530, 531 532, 533, 534, 536, 537, 538, 539, 540, 541, 542, and 543, in block 39, in McGee's addition; also ten acres of land in the city of Kansas, bounded on the north by McGee's addition, on the east by Vineyard's addition, on the south side by McGee's place, and on the west by Evans' addition; also five acres of land in the city of Kansas, being the undivided $\frac{1}{16}$th part of the north half of the northwest quarter of section 8, township 49, range 33; also lots 424, 425, 426, 434, and 435, in block 32, in McGee's addition; also

the undivided ½ interest in a block of land in McGee's and Holmes' addition 247 & ½ feet north and south by 274 feet east and west, bounded on the west by Oak street and on the east by Locust street and on the north and south by 14th street, all of the above-described real estate being in Kansas City, Mo.; also 9 acres of land off the north end of the east half of the northeast quarter of section 19, township 49, range 33, and two acres off the -outh end of the east half of the southeast quarter of section 18, same township and range; also the west half of lots 7 & 8 and the east half of lots 3 & 4 and the east half of the west half of lot 1, all in John Harris'
188 subdivision of the northwest quarter of section 20, in township 49, range 33; also $43\frac{7}{10}$ acres, de-cribed as follows: Beginning at the southwest corner of section 17, township 49, range 33, running thence east 1,324 feet; thence north $1,704\frac{3}{12}$ feet to center of turnpike; thence southwestwardly with turnpike 1,434 feet; thence south 1,154 & $\frac{6}{12}$ feet to place of beginning, excepting from the above description ten acres sold to — for Catholic school and church purposes; also the southeast quarter of the northwest quarter and the southwest — of the northeast quarter of section 35 and 20 acres off the north end of the west half of the southeast quarter and the north half of the north half of the southwest quarter and the northeast quarter and the southeast quarter of the northwest quarter, all in section 36, township 48, range 33; also 65 acres off the west end of the southwest quarter of section 33, in township 47, range 33, and $39\frac{46}{100}$ acres off the south end of the south half of the fractional section 31 and the undivided two-thirds interest in the east half of the southeast quarter of section 32 and the undivided two-thirds interest in 13 & $\frac{8}{10}$ acres off the north end of the south fractional half of the southwest quarter of section 32 and 10 acres off the north end of the southwest quarter of the south half of the southwest quarter of section 32, all in township 47, range 33, all the foregoing real estate situate in the county of Jackson and State of Missouri.

Also upon the following real estate, situate in the county of Johnson and State of Kansas, to wit:

The north half of the northeast quarter and the south half of the *of the* northeast quarter, both in section 13, and the west half of the southwest quarter of section 12, all in township 12, range
189 24; also the south half of blocks 45 and 47, block 46, south half of block 48 block 49 except lots 23 & 24, block 50 except lots 1, 2, 3, 4, 5, & 6, blocks 51, 52, 61, 62, 63, and 64, town of Shawnee, Johnson county, Kansas; also upon the following-described real estate, situate in the county of Nemaha, State of Kansas, to wit:

The southwest quarter of section 3, the east half of the northeast quarter and the south half of section (22) twenty-two, and the south half of the southwest quarter of section 25, all in township 2, in range 11; also the northeast quarter and the north half of the northwest quarter of section 14 and the northeast quarter of section 15 and the southwest quarter of section 21 and the southwest quarter and the southeast quarter of the northwest quarter of section 28 and the

northeast quarter of section 33 and the southeast quarter of section 34, all in township 3, range 11; also the northwest quarter and the north half of southwest quarter of section 29 and east half of the northwest quarter of section 31, all in township 5, range 11; also the northeast quarter of section 5 and the southeast quarter of section 6, both in township 2, range 12; also the northwest quarter and the north half of the southwest quarter of section 18 and the southwest quarter of section 19, all in township 3, range 12; also the southern 140 acres of southwest quarter of section 20 and the northwest quarter of section 22 and the northeast quarter of section 29, all in township 3, range 12; also the northeast quarter of section 31, township 4, and the east half of the northwest quarter of section 14 and east half of southeast — and east half of northwest quarter section 15 and east half of southeast quarter of section 20 and the north half of section 33, all in township 5, range 12;
190 also the north half of section 35, township 1, and southeast quarter of section 4 and east half of southeast quarter of section 35, township 5, all in range 13; also the southeast quarter of section 5 and the east half of the northwest quarter of section 6, both in township 4, and the northeast quarter section 19, in township 5, all in range 14; also the northeast quarter of section 33, in township 3; southeast quarter section 2 and the northwest quarter section 4, both in township 2, and all in range 12; also the south half of southwest quarter section 18 and northwest quarter section 19, both in township 3 and range 13; also the southwest quarter section 5, township 2, range 11; also the east half and northeast quarter of section 6, in township 2, range 10; also the northwest quarter section 23 and the southwest quarter section 28 and the southeast quarter and east half of the northeast quarter and west half of northwest quarter, in section 29, all in township 5, range 12; also the southeast quarter of section 8 and the southeast quarter section 10, both in township 5, range 13; also the northwest quarter section 6, township 3, range 14, containing in all seven thousand three hundred acres, more or less; and this said mortgage was filed for record on the 7th day of January, 1879, and was and is duly recorded in Book B 36, beginning at page 23, in the office of the recorder of deeds for Jackson county, Missouri.

That on the 3rd day of August, 1878, the said Mastin bank became insolvent and made an assignment of all its property and assets to one Kersey Coates in trust for the benefit of all its creditors, and that at this time defendant was holder and owner of the following-described notes, which it had purchased from the said Mastin bank, to wit:

191 Name of maker.	Amount.	When due.
S. D. Woods & Co.	$4,500 00	Aug. 8th, 1878
Thompson, Payne & Co.	8,887 31	Aug. 10, "
Drennon & Werk	5,000 00	Aug. 14, "
National Water Works Co.	19,720 00	Aug. 15, "
Powers bank	2,500 00	Aug. 15, "
Kansas City White Lead & Linseed Oil Co.	10,000	Aug. 22, "
Johnson & Crawford	10,000 00	Aug. 24, "
T. J. Bigger	10,000 00	Aug. 24, "
W. R. Bernard	5,184 00	Aug. 26, "
North Center Creek Mining & Smelting Co.	7,500 00	Sept. 1, "
R. F. Mastin	6,000 00	Sept. 2, "
S. E. Ward	25,000 00	Sept. 18, "
Johnson & Crawford	11,185 00	Sept. 19, "
White & Holmes	5,000 00	Sept. 19, "
North Center Creek M. & S. Co.	4,253 42	Sept. 21, "
T. J. Bigger	10,000 00	Sept. 23, "
R. T. Darnell	5,000 00	Sept. 28, "
O. H. P. Polk	7,000 00	Oct. 7, "
Patterson Stewart	8,000 00	Oct. 11, "
Kansas City White Lead & Linseed Oil Co.	10,000 00	Oct. 14, "
Samuel Archer	2,345 00	Oct. 16, "
S. E. Ward	25,000 00	Oct. 19, "
North Center M. & S. Co.	5,000 00	Oct. 20, "
S. E. Ward	13,500 00	Oct. 27, "

That both the said Mastin bank and your orators were endorsers upon all of said notes; that the said Mastin bank was such
192 endorser for value, having sold the said notes to defendant, as hereinbefore stated, and that your orators were only accommodation endorsers for the Mastin bank, and your orators were known by defendant to be such accommodation endorsers at the time defendant purchased said notes from the said Mastin bank, and the above-described notes were secured by the mortgage hereinbefore described, and they were the only debt or liability for which said mortgage was security.

That since the 3rd day of August, 1878, the said Drennon & Werk, the Powers bank, and Johnson & Crawford have at different times paid off to defendant the notes of which they were the respective makers and held and owned by defendant as aforesaid, and that their said notes were thereupon surrendered to them respectively by defendant, and your orators were and are thereby released and discharged from all liability or indebtedness to defendant on account of said notes mentioned in this paragraph.

That on or about May 21st, 1879, defendant reduced to judgment against the respective makers and against your orators as endorsers in the United States circuit court for the western division of the western district of Missouri the said notes of S. E. Ward, White & Holmes, R. F. Mastin, Patterson Stewart, and the Kansas City White Lead and Linseed Oil Co. (the said notes having been hereinbefore described in paragraph three), and that at various times since May 21st, 1879, the makers of each of said notes have paid off to defendant the judgments recovered against them respectively, and the said judgments have been and are satisfied of record by the defendant, and your orators were and are thereby released and discharged of all liability or indebtedness to defendant on
193 account of said notes or the judgments thereon mentioned in this paragraph.

That defendant on or about May 21st, 1879, obtained in the United States circuit court for the western division of the western district of Missouri other judgments upon other of said notes described in paragraph three against the respective makers thereof and against your orators as endorsers thereon as follows: On the note of S. D. Woods & Co. for $4,940.38, with 7 per cent. interest and $49.93 costs; on the note of Thompson, Payne & Co. for $9,756.93, with 10 per cent. interest and for $42.82 costs; on the note of Samuel Archer for $2,540.75, with seven per cent. interest and for $39.80 costs; on the note of W. R. Bernard for $5,659.43, with seven per cent. interest; on the three notes of the North Center Creek Mining and Smelting Co. for $18,334.46, with seven per cent. interest on $12,828.18, part thereof, and for $78.42 costs; on the two notes of T. J. Bigger for $16,102.90, with seven per cent. interest and for $50.68 costs.

That since the rendition of the judgments referred to in paragraph six, on May 21st, 1879, defendant has received the following sums from the makers of said notes to be applied on the judgments rendered on their respective notes, to wit: From S. D. Woods on January 23, 1883, $521.77, and on July 26th, 1883, $1,074.81; from W. R. Bernard on July 28, 1882, $2,450.00; from the North Creek Mining and Smelting Co., $348.80; that your orators are liable to account to defendant only for the balance due on said judgments after deducting the amounts paid to defendant by the *the* makers of said notes, as set forth in this paragraph; and your orators say that the said balance due on said judgments was long since fully paid off and discharged by payments made to defendant by your ora-
194 tors and K. Coates, assignee of the Martin bank, and by various credits and offsets to which your orators are entitled against the defendant, as hereinafter fully set forth.

That among the said notes referred to in paragraph three which were owned by the defendant on August 3d, 1878, and endorsed by your orators as accommodation endorsers, was one certain promissory note for $7,000, made by O. H. P. Polk, dated on or about July 1, 1878, payable 90 days after date; that said note was secured by a mortgage made by said Polk upon certain lands in Miami county, in the State of Kansas, and said security was amply sufficient to

pay said note in full, principal and interest, and that on or about December 20th, 1879, defendant, without the knowledge or consent of your orators, released and satisfied said mortgage, which was held for security for said note, and that your orators were and are thereby released and discharged of all liability or indebtedness to defendant on said note.

That partial payments by the makers thereof have been made to defendant upon certain of the said notes referred to in paragraph three, which are not reduced to judgment, as follows: The said R. T. Darnell, on the 29th day of March, 1879, paid $1,500 to defendant, to be applied to the payment of his said note for $5,000, dated July 27th, 1878, and payable sixty days after date, at Merchants' Exchange National Bank of New York; and the said O. H. P. Polk paid to defendant on March 22nd, 1879, $1,000, and on December 20th, 1879, $750, to be applied to the payment of his said note for $7,000, dated July 1st, 1878, and payable 90 days after date, at the Metropolitan National bank, New York; that as to the said note of the National Water Works Co. of New York for $19,720, dated May 14th, 1878, and payable 90 days after date, at the Metropolitan National Bank of New York, no payment has been made
195 thereon by the maker of said note; but your orators say that this last-mentioned note and all the balance due on the other notes mentioned in this paragraph, for which your orators are liable, and the balance due on any or all the notes referred to in paragraph three, after deducting the payments made thereon by the respective makers of such notes, have long since been fully paid off and discharged by payments made to defendant by your orators and by Kersey Coates, assignee of the said Mastin bank, and by various credits and effects to which your orators are entitled against defendant, as hereinafter fully set forth, and that defendant has no longer any just claim growing out of said notes referred to in paragraph three against your orators or against the said lands belonging to your orators, which were mortgaged to secure the payment of said notes, as hereinbefore stated.

That all of said notes referred to in paragraph three were sold to defendant by the Mastin bank, being notes which the said Mastin bank had discounted for its own customers, and were endorsed to defendant by said Mastin bank for value, and were further endorsed by your orators as accommodation endorsers for the said Mastin bank, and defendant knew that your orators were only accommodation endorsers, as aforesaid, when they purchased said notes from the said Mastin bank.

Your orators further say that the said accommodation endorsements for the said Mastin bank were made because of and under the following circumstances and facts, to wit: The defendant bank was one of the New York correspondents of the Mastin bank, and the latter bank kept its principal account in New York with the defendant bank, at which it kept a large balance to its credit; that
the said notes hereinbefore described belonged to and were
196 the property of said Mastin bank, your orators endorsing the same as accommodation endorsers for the said Mastin bank;

that similar purchases of notes had been made from the Mastin bank by defendant for several years, and the uniform practice of the defendaut bank was that if notes discounted by the defendant for the Mastin bank should not be paid at maturity, to charge immediately the amount thereof when dishonored against the Mastin bank with the assent of the said last-named bank; that your orators endorsed the said notes herein specified and described, as well as other notes, with knowledge of the aforesaid facts and with knowledge that the Mastin bank had to its credit a large balance with defendant, which endorsements were so made by your orators with the knowledge and understanding that if the said notes should be dishonored by the makers thereof they would be charged against the funds of the Mastin bank in the defendant's hands, which fund stood and was known to stand as a credit to your orators in respect of their said accommodation endorsements.

That on and after the said assignment of the said Mastin bank, on the 3rd day of August, 1878, to the said K. Coates defendant had on deposit a large balance of money, to wit, $63.398.49, to the credit of the said Mastin bank and which the said Mastin bank had deposited as aforesaid with defendant, and that the said money was applicable and should have been applied by defendant to the payment of the said notes held and owned by defendant as aforesaid, and upon which the said Mastin bank was endorser for value and your orators were accommodation endorsers as aforesaid.

That on and after the 9th day of October, 1878, defendant, well knowing that the said Mastin bank was insolvent, and that it had made an assignment of all its property to Kersey Coates, as-
197 signee, for the benefit of all its creditors, and that your ora-*o*trs were accommodation endorsers as aforesaid upon said notes, without consideration and without the knowledge or consent of your orators, surrendered and paid over to K. Coates, assignee of the said Mastin bank, the said sum of $63,398.49; that your orators were and are entitled to credit for this said sum of $63,398.49 upon or to set off the same against the claim of defendant upon your orators as accommodation endorsers of the said several notes upon which the said Mastin bank was prior endorser for value and which were not paid by the makers thereof, with interest from the dates of the said notes respectively.

That on and after the assignment of the said Mastin bank, on August 3rd, 1878, defendant had possession of various notes, a schedule of which is annexed as a part hereof and marked "A," amounting in the aggregate to $39,332.03, belonging to the said Mastin bank, and which the said Mastin bank had delivered into the possession of the defendant and which defendant was entitled to hold and should have held as security for the payment of said notes hereinbefore described and upon which the said Mastin bank was endorser for value and your orators were accommodation endorsers as aforesaid.

That afterwards the defendant, well knowing the fact hereinbefore stated, and that the said Mastin bank was insolvent, and that your orators were accommodation endorsers as aforesaid upon the said

notes sold by the said Mastin bank to defendant and held and owned by the defend-nt at the time of the assignment of the said Mastin bank, without consideration and without the knowledge or consent of your orators, surrendered and returned to K.
198 Coates, assignee of the said Mastin bank, the said notes, amounting in the aggregate to $39,332.03.

That your orators believe and state the fact to be that said notes were worth their face, and that your orators were and are entitled to credit for or to set off the sum of $39,332.03, with interest thereon from the maturity of the said last notes respectively, against the claim of defendant against your orators as accommodation endorsers of the said various notes, upon which the said Mastin bank was prior endorser for value, hereinbefore described and which were not paid by the makers thereof.

That on account of the endorsement of the Mastin bank on the said notes held and owned by defendant on August 3rd, 1878, a description of which was given in paragraph three hereof, the said K. Coates paid the defendant on April 28th, 1879, the sum of $25,339.40 and on January 1st, 1880, the sum of $9,489.46; that said sums were paid by said Coates as dividends of twelve per cent. and of five per cent. respectively on the said notes above described and on each of them respectively.

That your orators are entitled to credit for the said sum of $25,339.40, with interest from April 28th, 1879, and for the said sum of $9,489.46, with interest from January 1st, 1880, upon the claim of defendant against your orators as accommodation endorsers of said various notes, upon which the said Mastin bank was prior endorser for value and which were not paid by the makers thereof.

That on the 3rd day of August, 1878, all of your orators' liability or indebtedness to defendant was on account of your orators' said accommodation endorsements upon the said notes hereinbefore described in paragraph three.

That thereafter defendant, at the request and for the benefit of your orators and for the purpose of paying the taxes on the
199 said real estate of your orators mortgaged to defendant as hereinbefore stated, paid out the following sums of money on or about the dates set opposite: In the year 1879, on July 19th, $680.03; on August 16th, $25; in the year 1880, January 15th, $678.26; February 17th, $17.50; February 28th, $4,596.21; March 24th, $4,786.59; May 4th, $366.07 & $15; June 29th, $785.70; September 17th, $427.85; Sept. 27th, $15; Nov. 10th, $1,388.21, and Nov. 19th, $1,494.06; in the year 1881, on Feb. 7th, $3,029.22; Feb. 23rd, $619; March 1st, $64.13; March 30th, $245.86; April 9th, $96.03; April 16th, $79.25; April 30th, $24.60; May 31st, $1,837.48; August 23rd, $677.81 & $143.57; Sept. 21st, $152.45, and Dec. 9th, $714.67; in the year 1882, on Feb. 20th, $530.32; July 7th, $224.45; October 6th, $39.30; Dec. 1st, $909.23, and on Dec. 29th, $10; and in the year 1883, on May 29th, $500; July 21st, $375; July 31st, $50; Octo. 5th, $40.25; Nov. 24th, $25, and on Dec. 20th, $1,058.24.

Your orators say that the above-mentioned amounts are the only sums which defendant advanced or laid out, at the request or for

the benefit of your orators, in connection with said real estate or for any other purpose except as hereinafter stated, and of these sums there was returned and paid to defendant on April 29th, 1880, the sum of $67.34 and on June 10th, 1880, the sum of $50 and on January 16th, 1883, the sum of $126.19.

That all sums so advanced and paid out by defendant at the request and for the benefit of your orators, as set forth in this paragraph, have long since been repaid to defendant, with interest thereon, in payments and upon dates hereinafter fully set forth.

Your orators further say that on or about October 8th, 1878, your orators and defendant entered into a written contract hereto
200 annexed as part hereof, marked "B," and in pursuance thereof, on or about the 11th day of October, 1878, your orators gave to defendant their certain promissory note for $220,000.00, bearing interest at the rate of 7 per cent. per annum from date, for value received, and your orators delivered to defendant as collateral security therefor certain first-mortgage bonds of the National Water Works Co. of New York to the amount of $350,000.00, and allowed claims against the Mastin bank for $220,000.00; that afterwards, on April 8th, 1879, by the payment of $15,428.90 in money and the application upon said note of the coupons on said bonds falling due on April 1st, 1879, the amount due on this said note of $220.000 was reduced to $200,000, for which sum your orators gave their note, bearing interest at seven per cent., to defendant on that date and as security for which said bonds and the said allowed claims against the said Mastin bank were again delivered to defendant; that afterwards, about the 10th day of October, 1879, defendant returned to your orators a part of the said first-mortgage bonds of the National Water Works Company of New York, amounting to $62,000, and received from your orators at the same time certain other allowed claims against the said Mastin bank to the amount of $56,000 as further collateral security for and $907.25 in money as a payment on said note of $200,000.00.

That defendant received from K. Coates, assignee of the Mastin bank, on account of said allowed claims in this paragraph before mentioned and as dividends thereupon, on October 10th, 1879, the sum of $33,120.12, and on January 2nd, 1880, the sum of $13,800.05, and on March 21st, 1882, the sum of $2,300.40, which said sums were or should have been applied as payments on said notes of $200,000.00 on said dates.

201 That, as your orators are informed and believe, defendant sold at private sale, and otherwise disposed of without the authority, consent, or knowledge of your orators, the said 288 bonds of the National Water Works Company of New York and the coupons thereon, which your orators had as aforesaid delivered to defendants as security for their said notes. The amounts received by defendant on said bonds and the value thereof are, as plaintiffs are informed and believe, as follows, to wit:

1879.			
October	1.	Coupons on 350 bonds received by defendant	$12,250 00
1880.			
March	12.	100 bonds, $100,000.00, sold and disposed of by defendant, and accrued interest, $3,130.50, received by the defendant	103,130 50
April	1.	Coupons on 188 bonds received by the defendant	6,580 00
October	1.	Coupons on 188 bonds received by the defendant	6,580 00
1881.			
January	25.	100 bonds, $100,000.00, sold or disposed of by defendant, and accrued interest, $2,216.66, received by defendant	102,216 66
April	1.	Coupons on 88 bonds received by defendant	3,080 00
October	1.	Coupons on 88 bonds received by defendant	3,080 00
1882.			
April	1.	Coupons on 88 bonds received by defendants	3,080 00
August	7.	13 bonds, $13,000.00, sold or disposed of by defendant, and accrued interest, $318.50, received by defendant	13,318 50
August	11.	50 bonds, $50,000.00, sold or disposed of by defendant, and accrued interest, $1,263.88, received by defendant	51,263 88
August	18.	5 bonds, $5,000.00, sold or disposed of by defendant, and accrued interest, $133.18, received by defendant	5,133 18
October	1.	Coupons on 20 bonds received by defendant	700 00
1883.			
January	26.	20 bonds sold or disposed of by defendant and $20,000.00 and accrued interest received by defendant, $447.20	20,447 20

That the above statement of the said bonds of the National Water Works Company of New York sold or otherwise disposed of by defendant includes all the said bonds delivered to defendant by your orator as security for their said note of $200,000.00, except that part of said bonds, amounting to $62,000.00, which were returned to your orators by defendant about October 10th, 1879, as hereinbefore set forth; and your orators say that the said bonds were on the dates that they were sold or otherwise disposed of by defendant, as hereinbefore set forth, worth their face value with accrued interest, and defendant is liable to account to your orators accordingly.

That by your orators' payment of $907.25 upon said note about October 10th, 1879, and by the payments made by said K. Coates,

assignee of the said Mastin bank, on account of said allowed claims, as hereinbefore set forth in this paragraph, and by the said sale or other disposal of said bonds and coupons up to and including the sale or other disposal of 100 bonds on January 25th, 1881, as hereinbefore set forth, an amount of money was received by defendant sufficient to pay off said note of $200,000 and leave a balance to your orators' credit of more than $60,000, and defendant sold or disposed of a large number of said bonds after said note was fully paid off without the authority, consent, or knowledge of your orators, and thereby converted the same to its own use, and defendant is liable to account to your orators for the said balance of more than $60,000, with interest from January 25, 1881, and for the amount and value of said bonds, with accrued interest, and the coupons thereto, thereafter sold and otherwise disposed of, with interest from the respective dates of such sale or disposal.

203

That during the years 1881, 1882, and 1883 defendant received from the rent and sale of certain lands in the State of Kansas belonging to your orators and included in the aforementioned mortgage the following sums, to wit: From the rent of a part of said lands on Sept. 13, 1881, $86.20, and in September, 1882, $50.00.

From the sale of said lands the following sums on the debts set opposite, to wit: In the year 1882, Feb. 9th, $1,200; in the year 1883, Feb. 12th, $2,140.75; Feb. 28th, $732.25; March 17th, $54; April 19th, $4,067.80; April 23rd, $897.10; June 22nd, $943.55; in the year 1883, July 21st, $375.50; Sept. 17th, $1,014; Octo. 4th, $1,946.50; Oct. 13th, $1,688; Nov. 24th, $374.50; Nov. 26th, $56; Nov. 28th, $1,134.40; in the year 1884, Jan. 16th, $950; Jan. 31st, $420.25; March 8th, $577.10; March 17th, $2,235.85; March 31st, $752.65, and on May 3rd, $802.50.

That said sums, as above stated, were paid to defendant on account of your orators' supposed indebtedness to defendant and for the use and benefit of your orators, and that defendant is liable to account to your orators for said sums of money, with interest from the respective dates on which they were received.

204

Your orators further say that since the 3rd day of August, 1878, there has been no settlement and no accepted and agreed statement of account between your orators and defendant; that they have hereinbefore given to the best of their knowledge and belief a complete showing of the state of accounts between your orators and defendant, setting forth the nature and amount of your orators' indebtedness or liability to defendant and a statement of all moneys by defendant loaned to your orators or advanced and paid out for the benefit of your orators, and also the credits to which your orators claim to be entitled.

And your orators claim that the defendant is liable to and should account to your orators for and in respect of all sums of money which defendant has received from the makers or any of them of said endorsed notes and from the assignee of the Mastin bank on or about October 9th, 1878, as set out in paragraph eleven; and for the sum of $39,332.03, notes belonging to the Mastin bank, as described

in Schedule "A," hereto attached, and which defendant wrongfully, as respects your orators, surrendered and returned to said Kersey Coates, assignee, as set out in paragraph twelve; and for 288 first-mortgage bonds of one thousand dollars each of the National Water Works Company of New York by your orators delivered to defendant, and which defendant has sold or otherwise converted to its own use and failed and refused to account for, as set forth in paragraph fifteen; and for and in respect of certain claims and demands of your orators against the said Mastin bank and which your
205 orators delivered to defendant, and for the dividends thereon, which the defendant collected and received from the said K. Coates, assignee of the said Mastin bank, as set out in paragraph fifteen; and for and in respect of the rents and profits and proceeds of sale received from lands belonging to your orators, as set forth in paragraph sixteen; and for any other sums growing out of the transactions between your orators and defendant, as hereinbefore set forth, which defendant has received to the use of your orators or for which your orators are entitled to credit on any ground.

And your orators further show that they have frequently applied to the defendant and requested *ot* to come to an account in respect of the matters hereinbefore set forth and to admit and allow the credits and offsets hereinbefore claimed by your orators and to pay your orators what should be found to be justly due them upon said account, and that many other times, and in particular on the month of March, in the year 1885, your orators requested the defendant to acknowledge satisfaction of said mortgage on the record thereof or to deliver to your orators a sufficient deed of release of the said mortgage, at the same time tendering the cost thereof to the defendant, and your orators well hoped that the defendant would have complied with such requests, as in justice and equity it should have done, but the said defendant refuses to comply therewith and pretends that your orators are indebted to it, and in *his* said bill is endeavoring to foreclose the said mortgage.

And your orators pray that an account may be taken by and under the direction of this honorable court of all the dealings and transactions between your orators and the defendant; and in stating and taking such account defendant may be charged with the amount of all payments received from the makers on account
206 of the said endorsed notes, with the full amount of all such endorsed notes which defendant has surrendered and delivered to the makers thereof without having received full payment from the said makers, and also for the value of the mortgaged property released to the makers of said notes without having received from such makers payment in full thereof; third, with the said $63,398.49; fourth, with the said $39,332.03, value of the said notes mentione- in Schedule "A," wrongfully surrendered and delivered by defendant to the assignee of the Mastin bank; fifth, with all dividends and sums of money received by the defendant from the assignee of the Mastin bank, as hereinbefore set forth; sixth, with the value of 288 bonds of one thousand dollars each of the National Water Works Company of New York, belonging to your

orators, and for all interest received from the rents and sales of the lands of your orators; eighth, with all other sums or amount of money received by defendant belonging to your orators or for which they are entitled to be credited.

That in taking said account the sums of money received by defendant to the use of your orators shall be applied as of the dates on which they were received by defendant to the payment of the said endorsed notes and the judgments thereon, or that part of the same for which your orators are liable, and that the said notes and judgments bearing the highest rate of interest shall be first paid.

That if upon taking such account it shall appear that the defendant has received to the use of your orators a sufficient amount of money to pay off all of the said endorsed notes for which your orators are liable the defendant may be decreed to release and satisfy of record the said mortgage and to deliver to your orators all
207 of the said endorsed notes so paid by your — as endorsers and to pay to your orators their damages as provided by law on account of defendant's refusal to satisfy the said mortgage when requested so to do.

That the defendant be decreed to pay the balance found due to your orators upon such account, your orators being ready and hereby submitting to pay to defendant any balance found due to it from your orators, and the costs of this suit.

And that your orators may have such further and other relief in the premises as the nature of this case shall require and to your honors shall seem meet.

May it please your honors to grant unto your orators a writ of subpœna, to be directed to the said The Metropolitan National Bank of the City of New York, of the county of New York and State of New York, thereby commanding it, at a certain time and under a certain penalty therein to be limited, to appear before this honorable court, and then and there full, true, direct, and perfect answer — to all and singular the premises, and, further, to stand to, perform, and abide such further order, direction, and decree as shall seem agreeable to equity and good conscience.

And may it please your honors, inasmuch as the said defendant is a resident of the State of New York and without the jurisdiction of the officers of this court and is now conducting and prosecuting, through its solicitors, its said suit of foreclosure against your orators, and it seems probable that the said suit may be tried and determined before your orators' cross-bill would be answered if the said writ of subpœna were regularly served upon the defendant and your orators would thereby be greatly damaged and prejudiced in their rights in respect of the premises, to order that the said writ of sub-
208 pœna be served upon the defendant's solicitors of record in its said foreclosure suit against your orators, and that thus served it shall have the same virtue, force, and effect as if regularly served upon the defendant.

JOHN J. MASTIN,
THOMAS H. MASTIN,
By T. A. FRANK JONES, *Solicitor.*

John J. Mastin, being duly sworn, on his oath says that he has read the foregoing cross-bill and knows the contents thereof; that the said cross-bill is true to his own knowledge except as to those matters which are therein stated on information and belief, and as to those he believes them to be true.

JOHN J. MASTIN.

Subscribed and sworn to before me this 4th day of January, 1886.
[SEAL.] T. A. FRANK JONES,
Notary Public.

EXHIBITS.

"A."

Notes Held by the Metropolitan National Bank and Returned to K. Coates, Assignee, on April 17th, 1879, Without Consideration.

Name.	Due.	Amount.
R. F. Mastin	Sept. 10th, 1878	$1,501 25
Wm. Toms, sup't	" 21, "	4,254 67
T. J. Bigger	" 23, "	5,001 25
A. B. Matthews	" 25, "	4,067 25
W. H. Kingsbury	" 28, "	1,051 25
Wm. Toms, sup't	Oct. 20, "	5,001 25
S. D. & J. N. Irwin	Oct. 28, "	9,254 95
M. J. Payne	Oct. 30, "	7,096 00
M. S. C. Donnell	Nov. 4, "	2,104 16
		$39,332 03

209 "B."

This agreement, between John J. Mastin & Company, of Kansas City, Mo., and the Metropolitan National Bank of New York, witnesseth:

Whereas the said bank has loaned this day to the said Mastin & Co. two hundred and twenty thousand dollars, taking therefor note of said Mastin & Co. for said amount as aforesaid, due April 8th, 1879, with interest at the rate of seven per cent. per annum, with the guarantee of Donnell, Lawson & Co. thereon, said Mastin & Co. depositing as collateral the following, viz: Three hundred and fifty thousand dollars bonds of the National Water Works Company of New York and a check on the Mastin Bank of Kansas City, Mo., for two hundred and twenty thousand dollars:

In consideration of the foregoing it is expressly understood and agreed that any and all or any part thereof of the above-named collaterals after payment of the note as aforesaid may be held, sold,

or disposed of by said Metropolitan National bank and the proceeds thereof applied to the payment of any indebtedness of said John J. Mastin & Co. or Mastin Bank of Kansas City now due or which may hereafter become due to said Metropolitan National bank. It is further understood and agreed that said Metropolitan National bank shall account for and return to said John J. Mastin & Co. the surplus of collaterals or proceeds thereof so held or disposed of after payment of such indebtedness as aforesaid as said Mastin & Co. may direct.

In witness whereof we have hereunto set our hands and seals this 8th day of October, eighteen hundred and seventy-eight.

[SEAL.] JOHN J. MASTIN & CO.
METROPOLITAN NATIONAL BANK,
By GEORGE I. SENEY, *President.*

210 Whereas Messrs. Donnell, Lawson & Co. have guaranteed the loan mentioned in the foregoing agreement, to wit, two hundred and twenty thousand dollars; and whereas other liabilities and obligations exist to Donnell, Lawson & Co. from the Mastin bank and John J. Mastin & Co.: Now, therefore, in consideration of said guaranty and of said liabilities and obligations, we, the undersigned, do hereby assign and set over to Donnell, Lawson & Co. all the securities mentioned in the foregoing agreement which are held by the Metropolitan bank as collateral security for said loan, viz., three hundred and fifty thousand dollars bonds of the National Water Works Company of New York and a check on the Mastin bank for two hundred and twenty thousand dollars, subject, however, to the terms and obligations of the foregoing agreement, and the Metropolitan National bank is hereby authorized and directed to account to said Donnell, Lawson & Co. for the said securities.

New York, April 8th, 1879.

JOHN J. MASTIN & CO.

Afterwards, to wit, on the 1st day of February, 1886, the following entry appears of record:

METROPOLITAN NATIONAL BANK
against
BATES CO. NAT. B'K *et al.* } 98.

Now comes complainant, by its attorney, and files supplemental bill herein and replications to defendants' answers.

Said supplemental bill is in words and figures as follows:

211 In the Circuit Court of the United States for the Western District of Missouri, Western Division.

THE METROPOLITAN NATIONAL BANK OF THE CITY OF NEW YORK
v.
THE BATES COUNTY NATIONAL BANK *et al.*

Supplemental Bill.

To the judges of said court:

Your orator, The said Metropolitan National Bank of the City of New York, brings this its supplemental bill against the several parties named in its original bill, and also against F. L. Underwood, Robert F. Crawford, and —— Johnson, administrator of the estate of A. H. Johnson, deceased, who are hereby made parties defendant.

And thereupon your orator complains and says that since the filing of the original bill the said F. L. Underwood, Robert F. Crawford, and —— Johnson, administrator as aforesaid, claim to have acquired an interest in the subject-matter of this suit and in the mortgaged premises described in the original bill, which interest they claim under and by virtue of an assignment to the said F. L. Underwood of one of the notes secured by the mortgage mentioned in the original bill in trust for a certain copartnership composed of Robert F. Crawford and A. H. Johnson under the firm name and style of Johnson & Crawford, said A. H. Johnson having since died and said —— Johnson having been duly appointed his administrator.

Wherefore your orator prays that the said F. L. Underwood, Robert F. Crawford, and —— Johnson, administrator of the estate of A. H. Johnson, deceased, may be made parties defendant
212 herein and be required to answer, setting forth fully any interest or claim they may have in and to the said mortgaged premises or in and to any of the proceeds of the sale thereof, and in default thereof that all their interest, right, claim, and equity of redemption be barred, cut off, and forever foreclosed by the final decree herein.

PRATT, BRUMBACK & FERRY,
GEO. W. McCRARY,
Solicitors for Complainant.

Said replications are in words and figures as follows, to wit:

In the Circuit Court of the United States in and for the Western District of Missouri, Western Division.

METROPOLITAN NATIONAL BANK
v.
BATES COUNTY NATIONAL BANK *et al.*

The replication of The Metropolitan National Bank, complainant, to the answer of John J. Mastin and Thomas H. Mastin, defendants.

This repliant, saving and reserving to himself all manner of ad-

vantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that answer of the said defendants is very uncertain, evasive, and insufficient in the law to be replied — by this repliant; without that, that any other matter or thing in the said answer contained materially or effectually in the law to be replied unto and not
213 herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

PRATT, BRUMBACK & FERRY,
GEO. W. McCRARY,
Solicitors for Respondent.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE METROPOLITAN NATIONAL BANK OF THE CITY OF NEW YORK, Complainant,
vs.
BATES COUNTY NATIONAL BANK *et als.*, Defendants. } In Equity.

The Replication of said Complainant to the Answer of the Defendants John J. Mastin and Thomas H. Mastin.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefit and advantage of exceptions which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver and prove its said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all
214 which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humply prays as in and by its said bill it has already prayed.

GEO. W. McCRARY AND
PRATT, BRUMBACK & FERRY,
Sol'rs for Compl't.

The following entry also appears of record on said day, to wit:

JOHN J. MASTIN *et al.*
against
METROPOLITAN NAT. BANK. } 1080.

Now comes defendant, by Messrs. Pratt, Brumback & Ferry, its solicitors, and files answer to complainants' cross-bill, and also demurrer to the 2nd, 3rd, 10th, 11th, 12th, & 15th paragraphs of said cross-bill.

Said answer is in words and figures as follows:

In the Circuit Court of the United States, Western District of Missouri, Western Division.

JOHN J. MASTIN & THOMAS H. MASTIN, Complainant-,
vs.
THE METROPOLITAN NATIONAL BANK OF NEW YORK *et al.*, Respondents.

The answer of the respondent The Metropolitan National Bank of the City of New York to the cross-bill of complainants, John J. Mastin and Thomas H. Mastin.

This respondent, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said cross-bill contained,
215 for answer to so much thereof as this respondent is advised it is material or necessary for it to make answer to, answering, saith: Respondent, answering paragraph one of said cross-bill, admits that it has filed its bill in this honorable court against the said complainants and divers other persons, to foreclose a mortgage, as set forth in the first paragraph of said cross-bill, given to secure the payment of all notes, drafts, or bills sold and endorsed or that might be sold or endorsed to this respondent by the Mastin Bank of Kansas City, Missouri, and charging that certain of such notes had not been paid, and praying an account and for decree as alleged.

Respondent denies that said mortgage and the notes thereby secured were a part and connected with other business dealings between complainant- and this respondent extending over a period of many years and which are of an intricate character; denies that before and since the filing of the said original bill by this respondent large sums of money have been paid to this respondent in the course of said business dealings and transactions which this respondent should have applied to the payment of said notes secured by said mortgage, but has failed so to do; denies that since the filing of said bill large sums of money have been paid to this respondent by the makers of said notes and by Kersey Coates, assignee of the Mastin bank, which this respondent should have applied to the payment of the said notes, but has failed so to do; denies that any sums have been paid to this respondent which respondent has not faithfully applied to the extinguishment of said

notes; denies that complainants are entitled to any credits or offsets against this respondent *it* respect of its demand against
216 complainants on account of said notes not hereinbefore or herein allowed to them, and denies that *ipon* proper accounting and all proper offsets allowed it would appear that the liabilities of said complainants to this respondent on account of said notes *was* long since paid off and discharged or that a considerable balance or any balance would be due from this respondent to complainants; denies that complainants have made in their said cross-bill a complete statement of the business and dealings and transactions between complainants and respondent.

Answering the fourth paragraph of said cross-bill, respondent denies that since the third day of August, 1878, Drennon & Werk, the Powers bank, and Johnson & Crawford have at different times paid off to this respondent the notes secured by the aforesaid mortgage, of which they were respectively makers, and held and owned by respondent as alleged.

Answering the fifth paragraph of said cross-bill, respondent admits that the notes therein referred to against S. E. Ward, White & Holmes, B. F. Mastin, Patterson Stewart, and the Kansas City White Lead & Linseed Oil Company were by this respondent reduced to judgment as alleged, but denies that at various times since Mat 21st, 1879, the makers of each of said notes have paid off to this respondent the judgments recovered against them respectively, and denies that the said judgments are satisfied of record and that the complainants are released from all liability or indebtedness to respondent on account of said notes or the judgments thereon.

Answering the sixth and seventh paragraphs of the said cross-bill, this respondent admits the rendition of judgments as alleged in the sixth paragraph, but denies that the payments were made by the makers of said notes upon such judgments as alleged in the said seventh paragraph, and denies that the balance due on said judgments was long since fully paid off and discharged.

217 Answering the eighth paragraph of said cross-bill, this respondent admits that the note therein described executed by one O. H. P. Polk was secured by mortgage as alleged, but denies that the said security was amply sufficient to pay said note in full, principal and interest, and further denies that on or about Secember 20th, 1879, respondent, without the knowledge or consent of complainants, released and satisfied said mortgage.

Answering the ninth paragraph of said cross-bill, the respondent denies that partial payments have been made to it upon certain notes mentioned in said paragraph, as alleged therein, and denies each of the payments therein set forth, and denies that all balances due on the note of the National Water Works Company of New York for $19,720, therein mentioned, and all balances due on the other notes in said paragraph mentioned and referred to have been paid in full; denies that all the notes have been fully paid off and discharged by payments to respondent as alleged.

Answering the thirteenth paragraph of the said cross-bill, re-

spondent denies that payments were made by K. Coates, assignee, as in said paragraph alleged.

Answering the fourteenth paragraph of said cross-bill, respondent says it admits that at the request and for the benefit of complainants and for the purpose of paying the taxes on the real estate mortgaged as aforesaid it paid out the sums of money in said paragraph mentioned; but respondent denies that the amounts stated in the said paragraph are the only sums which respondent advanced or laid out at the request or for the benefit of the complainants in connection with said real estate or for any other purpose, except
218 as elsewhere stated in said cross-bill, and further denies that of these sums there *was* returned and paid to respondent the sums in said paragraph mentioned as having been so returned, and denies that all sums advanced by respondent at the request and for the benefit of complainants have been repaid to respondent, with interest, as alleged.

Answering the sixteenth paragraph of said cross-bill, respondent denies that it received during the years 1881, 1882, and 1883 from the rent and sale of lands in Kansas belonging to complainants the sums stated in said paragraph or any other sums; denies that the sums named in said paragraph were paid to respondent on account of complainants' supposed indebtedness to it and for the use and benefit of complainants, and denies that it is liable to account therefor, as alleged.

Answering the seventeenth paragraph of said cross-bill, this respondent denies that the complainants have frequently applied to respondent and requested it to come to an account, as alleged; admits that complainants requested satisfaction of the mortgage in said paragraph mentioned and that respondent refused to comply with said request because the debts secured by said mortgage had not been paid.

And this respondent denies all and all manner of unlawful confederacy wherewith it is by the said cross-bill charged; all which matters and things this respondent is ready to aver and prove as this court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

PRATT, BRUMBACK & FERRY,
GEO. W. McCRARY,
Solicitors for Respondent.

Verification of the foregoing answer is hereby waived.

219 T. A. FRANK JONES,
Solicitors for Complainants in Cross-Bill.

Said demurrer is in words and figures as follows:

In the Circuit Court for the Western District of Missouri, Western Division.

JOHN J. MASTIN & THOMAS H. MASTIN
v.
THE METROPOLITAN NATIONAL BANK.

Demurrer of The Metropolitan National Bank, Respondent, to Portions of Cross-Bill of John J. Mastin and Thomas H. Mastin.

This respondent, by protestation, not confessing any of the matters in and by said cross-bill complained of to be true in manner and form as the same are set forth, says that it is advised that there is no matter or thing in the second, third, tenth, eleventh, twelfth, and fifteenth paragraphs of said cross-bill good and sufficient in law to call this respondent to account in this honorable court for the same, but that there is good cause of demurrer thereunto, and it does demur accordingly, and for causes of demurrer says that said second, third, eleventh, twelfth, and fifteenth paragraphs of said cross-bill, in case the same were true, contain no matter of equity whereon this court can ground any decree or give complainants any relief as against this respondent.

Wherefore and for divers other errors in said paragraphs of said cross-bill contained and appearing on the face thereof this respondent does demur thereto and humbly crave the judgment of this honorable court whether it is compellable or ought to make any answer thereunto otherwise than as aforesaid; and this respondent
220 humbly prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

PRATT, BRUMBACK & FERRY,
GEO. W. McCRARY,
Solicitors for Respondent.

I, George W. McCrary, of counsel for the respondent, The Metropolitan National Bank, do hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

GEO. W. McCRARY.

STATE OF MISSOURI, } ss:
County of Jackson, }

I, —— ——, being first duly sworn, on oath say that I am one of the attorneys of The Metropolitan National Bank of New York, respondent in the cross-bill, to portions of which the foregoing demurrer is *south* to be interposed; that neither the said respondent nor any of its officers is at present within the western district of Missouri; that I am engaged in the conduct of this suit, and that such demurrer is not filed for the purpose of delay, but to further and secure the ends of justice.

—— ——.

Subscribed and sworn to before me this — day of ——, 1886. My term as —— expires on the — day of ——, 18—.

—— ——.

Afterwards, on the 5th day of February, 1886, the following entry appears of record:

JOHN J. MASTIN *et al.*
against
METROPOLITAN NAT. B'K. } 1080.

Now comes complainants, by their solicitors, and files replication to defendant's answer herein.

Said replication is in words and figures as follows:

221 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

JOHN J. MASTIN and THOMAS H. MASTIN
against
THE METROPOLITAN NATIONAL BANK.

The replication of John J. Mastin and Thomas H. Mastin, complainants, to the answer of The Metropolitan National Bank, defendants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto say that they do and will aver, maintain, and prove their said bill to be true, certain, sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied — by these repliants; without that, that any other matter or thing in the said answer contained materially or effectually in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by *his* said bill they have already prayed.

T. A. FRANK JONES.
Solicitor for Pl'ffs.

Afterwards, to wit, on the 18th day of February, 1886, the following entry appears of record:

222 MET. NAT. BANK
against
BATES CO. NAT. BANK *et al.* } 98.

This day come defendants F. L. Underwood, J. N. Johnson, adm'r, and R. F. Crawford, by J. F. Mister, their solicitor, and file answer herein.

Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE METROPOLITAN NATIONAL BANK OF THE CITY OF NEW YORK
v.
BATES COUNTY NATIONAL BANK and Others. } No. 98.

The answer of F. L. Underwood, Robert F. Crawford, and Jesse N. Johnson, administrator of Augustus H. Johnson, deceased, defendants, to the bill of complaint of The Metropolitan National Bank of the City of New York, plaintiff.

The defendants, for answer to so much of said bill as they are advised it is material or necessary for them to make answer unto, do make answer as follows:

That subsequently to the filing of the bill of complaint and during the pendency of proceedings thereunder and with reference to the said pendency—that is to say, on the 20th day of October, 1880—an agreement was made and entered into between the said Metropolitan National Bank of New York and F. L. Underwood of the tenor and effect following—that is to say:

"This agreement, made and entered into this 20th day of October, 1880, by and between the Metropolitan National Bank
223 of New York, party of the first part, and F. L. Underwood, party of the second part, witnesseth:

First. That the said party of the first part, as endorsee from the Mastin Bank of Kansas City, Missouri, is the owner and holder of a certain promissory note executed by Johnson and Crawford to Quinlan, Montgomery and Company, and by said Quinlan, Montgomery and Company endorsed, and upon which said note there is a balance due of principal and interest at this date of 7,603.51, and for which suit is now pending in the United States circuit court at Kansas City.

Second. On said note John J. Mastin and Thomas H. Mastin are also endorsers, and to secure the payment of the same, with other liabilities, said Mastins executed to said party of the first part a mortgage on certain real estate in Missouri and Kansas, and to foreclose said mortgage suits are now pending, one in the circuit court of the United States at Kansas City and one in the same court at Topeka, Kansas.

Third. For and in consideration of the sum of 7,603.50, paid to said party of the first part by said party of the second part, and the payment of all costs in said suit thereon, said note so executed by said Johnson and Crawford has this day been assigned and transferred without recourse to said party of the second part.

Fourth. It is also further agreed as a part of said assignment and transfer that the said party of the second part shall release and hereby releases all claim or interest in so much of said mortgage as covers the real estate therein described and lying in the State of Kansas; but as to the land lying in the State of Missouri and covered by said mortgage the said party of the second part shall re-

tain his interest therein in consideration of the release of the
224 Kansas lands as aforesaid; and the said party of the first part stipulates and agrees that in said foreclosure proceedings it will file a supplemental bill showing this assignment of said note, and to which said party of the second part agrees to enter his appearance and make proper answer or a plea thereto, so that the same may be determined as a part of said foreclosure and so that said party of the second part may obtain such orders as he may deem necessary and proper to obtain a *pro rata* division of the proceeds arising from the decree of foreclosure.

Fifth. In all matters pertaining to said mortgage, whether by foreclosure or otherwise, it is agreed by and between the parties hereto that the same shall be managed exclusively by said party of the first part without any interference or hindrance by said party of the second part: Provided, however, that nothing shall be done to impair or affect the right of said party of the second part to receive his *pro rata* share of whatever sum may be realized by foreclosure or otherwise from the Missouri lands.

Sixth. It is also further agreed by and between the parties hereto that, except as to the Kansas land so released as hereinbefore recited, said party of the second part shall be entitled to receive on said note a *pro rata* share of any other security held by said party of the first part for this and other indebtedness of said John J. Mastin and Thomas H. Mastin.

Executed in duplicate the day and year aforesaid.

THE METROPOLITAN NATIONAL BANK
OF NEW YORK,
By KARNES & ESS, *Attorneys.*
F. L. UNDERWOOD."

That the purport and effect of said agreement is that in consider-
ation of the payment of the note therein mentioned (which had
225 been somewhat reduced by payments, as therein stated) by the said Underwood he should be subrogated to the rights of the Metropolitan National Bank of New York as to the mortgaged property in Missouri and receive his *pro rata* of the amount realized out of said property and on any other security held by the said Metropolitan National Bank of New York to secure the indebtedness of John J. Mastin and Thomas H. Mastin to the extent of such payment aforesaid, and that said bank would file supplemental bill setting up the assignment and transfer, and that Underwood would enter appearance and make proper answer or plea thereto, so that the same might be determined as a part of said foreclosure, and so that said Underwood might obtain such orders as he might deem necessary and proper to obtain a *pro rata* division of the proceeds arising from the decree of foreclosure; and these defendants say that the said agreement aforesaid was made with and by said Underwood as the representative of and for the benefit of defendant Crawford and the intestate of defendant Jesse N. Johnson, and also of Quinlan, Montgomery & Co., who were indorsers on said note, but that since the said agreement settlement has been made between John-

son & Crawford and Quinlan, Montgomery and Company as to said note, so that defendants Crawford and Jesse N. Johnson, as administrator of Augustus H. Johnson, deceased, are alone entitled to the benefit of said agreement.

And these defendants, further answering, say that the said agreement made between the Metropolitan National Bank of New York and defendant F. L. Underwood was made at the instance, with the concurrence, and upon the request of defendants John J. Mastin and Thomas H. Maston, the mortgagors in the conveyance herein sought to be foreclosed, and with their express sanction and approval,
226 previously made and manifested both to the said Metropolitan National Bank of New York and to all the parties to said note and the said Underwood, in settlement and adjustment of controversies between said Mastins and the parties to said note, and that the agreement itself was prepared by and executed under the direction of said Mastins, through their attorneys, Karnes & Ess, and that said agreement has been recognized and ratified by the said Mastins and their attorneys from the date thereof until a time shortly before the filing of this answer, to wit, about the 1 January, 1885, and the said John J. Mastin and Thomas H. Mastin are and have been from the making thereof actually and directly parties to said agreement so made as aforesaid and all the stipulations thereof.

And these defendants, further answering, say that the defendants John J. Mastin and Thomas H. Mastin were parties to the note mentioned in the agreement between said Metropolitan National Bank of New York and defendant F. L. Underwood, as indorsers of said note for value under the firm name of John J. Mastin and Co., and had endorsed the same to the Mastin bank, which endorsed the same for value to the Metropolitan National bank, and their liability as such endorsers had been fixed, and they had secured the payment of said note by the mortgage herein sought to be foreclosed, with other indebtedness due from them to said Metropolitan National Bank of New York, and that said suit had been brought against them and against defendant Johnson's intestate and defendant Crawford, and also against Quinlan, Montgomery and Company, in the circuit court of the United States for the western division of the western district of Missouri, held at Kansas City, and was pending in said court at the date of said agreement, and was the occasion of the settlement, adjustment, and arrangement manifested by
227 said agreement, and said agreement is the result of the disposition of the controverted matters concerning said note between all the parties to said note who were parties to said suit in the said circuit court of the United States aforesaid; and these defendants charge and state that the said note mentioned in said agreement aforesaid between said bank and defendant F. L. Underwood was made by defendant Jesse N. Johnson's intestate and defendant Crawford, under their firm name of Johnson & Crawford, and indorsed by Quinlan, Montgomery & Company and delivered to defendants John J. Mastin and Thomas H. Mastin by their firm name of John J. Mastin and Company, and by them, under their

said firm name aforesaid, to the Mastin bank, and by it endorsed to said Metropolitan National Bank of New York for value and its payment secured, with other indebtedness, by the mortgage herein sought to be foreclosed; that the sole consideration for said note to defendants Johnson and Crawford was a certain certificate of deposit made by the Mastin bank on the 18th July, 1878, contemporaneously with said note aforesaid, whereby said The Mastin bank acknowledged that one G. Baer had on that day deposited with the said The Mastin bank the sum of ten thousand dollars, which said The Mastin bank thereby promised to pay to the order of said G. Baer, thirty days after date, in New York exchange, on the return of said certificate, properly indorsed, and in consideration of which said John J. Mastin and Company indorsed to said The Mastin bank the note mentioned in said agreement between said Metropolitan National Bank of New York and defendant F. L. Underwood, and secured its payment, with other indebtedness, by the mortgage herein sought to be foreclosed, the said The Mastin bank having endorsed said note for value to said Metropolitan National Bank of New York; that said certificate of deposit was
228 duly presented for payment at the maturity thereof at said The Mastin bank and payment thereof demanded, but said bank had then suspended payment and had made an assignment to Kersey Coates for the benefit of all its creditors under the laws of Missouri and did not pay the said certificate of deposit or any part thereof; whereupon the said Johnson & Crawford and Quinlan, Montgomery and Company paid the said certificate of deposit to the holder thereof and held the same at the time of the suit on said note so given as aforesaid by said Metropolitan National Bank of New York aforesaid and at the time of the settlement of said suit between said Metropolitan National bank and said Underwood by the agreement hereinbefore mentioned and set forth, and by reason of all which the consideration of said note as between defendant and Johnson's intestate and said Crawford, and the said John J. Mastin and Company and the Mastin bank, on the other side, wholly failed, and the said John J. Mastin and Company and the Mastin bank received ten thousand dollars from the Metropolitan National Bank of New York by the discounting of said note aforesaid.

And these defendants, further answering, say that at the time of the agreement so made between the said Metropolitan National Bank of New York and said defendant F. L. Underwood there had been payments made upon said note mentioned in said agreement as follows—that is to say, from Kersey Coates, assignee of the Mastin bank, as the first and second dividends made by said assignee out of the estate of said bank in assignment, the first being of the date of March 26, 1879, and of the amount of 1,238.12 dollars, and being twelve (12) per cent. on the allowance made by said assignee as to said note; the second being of the date of January 8, 1880, and of the amount of 452.29 dollars, and being five (5) per cent. on
229 the allowance made as aforesaid; also dividends from said assignee upon the certificate of deposit hereinbefore mentioned, which had been paid by Johnson and Crawford and Quin-

lan, Montgomery and Company and was then held by them and was so held at the time of agreement between said Metropolitan National Bank of New York and defendant F. L. Underwood, of the dates and amounts following—that is to say, on the 21 May, 1879, of the amount of 1,271.38 dollars, and on the 17 May, 1880, of the amount of 529.94 dollars—were, with the payments first above mentioned, all applied to the reduction of said note mentioned in said agreement between said Metropolitan National Bank of New York and said F. L. Underwood, leaving a balance due to said bank on said note, after the payment of interest and of the costs of said suit in the circuit court of the United States aforesaid, of the sum of seven thousand six hundred and forty dollars and sixty-three cents ($7,640.63), being the amount mentioned in the agreement between said Metropolitan National Bank of New York and said defendant F. L. Underwood aforesaid.

And these defendants, further answering, say that subsequently to the date of the agreement aforesaid between the said Metropolitan National Bank of New York and defendant F. L. Underwood, to wit, about the 22 day of September, 1884, there was a further payment of dividends by said Kersey Coates, assignee of the Mastin bank as aforesaid, of twenty (20) per cent. of the amount allowed, and that said dividends, as well on said note mentioned in said agreement aforesaid as on said certificate of deposit hereinbefore mentioned, were claimed by and paid over to defendants John J. Mastin and Thomas H. Mastin under and by virtue of the agreement so made by the Metropolitan National Bank of New York with defendant F. L. Underwood and in recognition, confirmation, and ratification of the terms of said agreement, and thereby receiving
230 and taking two thousand dollars dividend on the certificate of deposit aforesaid which, except for said agreement, belonged to defendant Johnson's intestate and defendant Crawford and to which said Mastins had otherwise no pretence of claim whatever.

And these defendants, further answering, say that since the making of the said agreement aforesaid between the said Metropolitan National Bank of New York and defendant F. L. Underwood, to wit, on or about the — day of August, 1881, Augustus H. Johnson, one of the parties to the note mentioned in said agreement aforesaid and the same Johnson whose name is signed with defendant Crawford under the firm name of Johnson and Crawford, departed this life, leaving property in Jackson county, State of Missouri, and that letters of administration were duly granted to defendant Jesse N. Johnson upon his estate by the probate court of Jackson county, State of Missouri, held at Kansas City, at the November term thereof, A. D. 1884, and that he duly qualified as such pursuant to the requirements of the statutes of Missouri and is now the duly qualified and acting administrator of the estate of said Augustus H. Johnson.

Wherefore these defendants claim that under the facts hereinbefore set forth and the agreement herein set up they are entitled as follows: First, to stand in the place and be subrogated to the rights of the Metropolitan National Bank of New York in all its rights

under the mortgage herein sought to be foreclosed and in all other securities held by it for the payment of the indebtedness owing by said John J. Mastin and Thomas H. Mastin to said bank in settlement and adjustment of the note mentioned in said agreement between said Metropolitan National Bank of New York and defendant F. L. Underwood, hereinbefore mentioned, and all
231 interest thereon.

Second. To be repaid the amount of said payment aforesaid and interest by said Metropolitan National Bank of New York in the event that as between the said bank and the said John J. Mastin and Thomas H. Mastin the said payment of balance so paid to it as aforesaid should not be held as binding the said Mastins to carry out the agreement so made by them and the said bank with these defendants, so that the matters so agreed to be adjusted should be left open and unsettled between the Mastins and these defendants and so that these defendants shall not be prejudiced by the disavowal of an agreement rendered ineffectual by the fraud and bad faith of defendants John J. Mastin and Thomas H. Mastin.

Third. That these defendants should be repaid the full amount and interest of all the dividends collected, received, and accounted for and held by said John J. Mastin and Thomas H. Mastin on the certificate of deposit belonging to defendant's intestate and defendant Crawford and so collected, received, and held rightfully under the said agreement between said Metropolitan National Bank of New York and defendant F. L. Underwood, but which said Mastins now disavow and repudiate and which, under said disavowal and repudiation, was fraudulently and wrongfully taken and held by said John J. Mastin and Thomas H. Mastin as to defendant's intestate, Augustus H. Johnson, and as to defendant Robert F. Crawford.

All which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray for the relief herein asked and such other and general relief as they may be entitled to in equity and good conscience, with their reasonable costs and charges in this behalf sustained.

JAS. F. MISTER,
Solicitor for Defendants.

232 UNITED STATES OF AMERICA, }
State of Missouri, County of Jackson, } *ss:*

On this 18th day of February, A. D. 1886, before the undersigned, a notary public within and for the county and State aforesaid, personally appeared Robert F. Crawford, one of the defendants in the above-entitled cause, and makes oath that the matters stated in the foregoing answer are true to the best of his knowledge and belief.

ROBERT F. CRAWFORD.

Subscribed and sworn to before me on the day and year aforesaid, as witness my hand and notarial seal. My commission expires 29th day of October, 1889.

[SEAL.] JOHN W. NORTON,
Notary Public for Jackson County, State of Missouri.

Afterwards, to wit, on the 20th day of April, 1886, a stipulation was filed in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE METROPOLITAN NATIONAL BANK OF THE CITY OF NEW YORK
vs.
BATES COUNTY NATIONAL BANK and Others. } No. 98.

It is hereby stipulated between T. A. Frank Jones, attorney for John J. Mastin and Thomas H. Mastin, of the one part, and James F. Mister, attorney for F. L. Underwood, Robert F. Crawford, and Jesse N. Johnson, administrator of Augustus H. Johnson, deceased, of the other part, as follows:

233 1. That the records, pleadings, exhibits, instruments, documents, and depositions on file or in proof, either in this case or that of The Metropolitan National Bank of New York *vs.* A. H. Johnson *et al.*, No. 112 (both instituted in this court), or either of them may be used in evidence in lieu of certified copies by either of the parties herein represented as evidence of what they respectively purport to show.

2. That in addition thereto the following list of papers and documents, referred to in evidence in the controversy between the parties represented herein under an answer in the nature of a cross-bill and the answer of John J. Mastin and Thomas H. Mastin thereto, may also be used in evidence in the same way without further formalities by either of the parties hereto—that is to say:

1. Note of $10,000 made by Johnson & Crawford, dated July 18, 1878, which is attached to the deposition of J. V. C. Karnes as Exhibit —, with its endorsements.

2. The certificate of deposit of the Mastin bank issued to G. Baer by said bank, of same date, for 10,000 dollars, which is also attached to the deposition of said Karnes.

3. The mortgage of John J. Mastin and Thomas H. Mastin to the Metropolitan National Bank of New York to secure the indebtedness of the Mastin bank to it, now sought to be foreclosed in this proceeding in this court.

4. Memorandum of agreement with Karnes & Ess of May 20, 1879, concerning the above 10,000-dollar note pleaded in the answer to suit of Metropolitan National Bank *v.* A. H. Johnson *et al.*, No. 112 in this court.

234 5. Agreement of Metropolitan National bank with F. L. Underwood of 20th October, 1880, concerning same note last above mentioned.

6. Declaration of trust or memorandum of assignment by F. L. Underwood to C. C. Quinlan and A. H. Johnson of all benefits of the agreement of October 20, 1880, with Metropolitan National Bank of New York.

7. Statement of John J. Mastin & Co. as to dividends, dated Feb'y 23, 1885.

It is further stipulated herein as follows as mutually admitted, and proof thereof is hereby waived:

I. That on the 2nd of August, 1878, the Mastin bank made an assignment under the laws of Missouri to Kersey Coates for the benefit of all its creditors.

II. That Augustus H. Johnson departed this life about the — day of August, A. D. 1881, and that Jesse N. Johnson was duly appointed and qualified as administrator of his estate and is now the duly appointed, qualified, and acting administrator of said estate.

III. That the Mastin bank was prior to its assignment a corporation duly organized & incorporated under the laws of the State of Missouri as a bank and did business in Kansas City, Mo., as such.

T. A. FRANK JONES,
Solicitor for Jno. J. & T. H. Mastin.
JAS. F. MISTER,
Solicitor for Underwood, Johnson, & Crawford.

April 20, 1886.

Afterwards, to wit, at the regular October term of said court and on the 29th day of October, 1886, the following entry appears of record.

235 METROPOLITAN NATIONAL BANK *afainst* BATES CO. NAT. BANK *et al.* } 98.

This day come the parties, by their solicitors, the complainant by J. F. Mister, Esq., and the defendants by Frank Jones and C. O. Tichenor; thereupon defendants J. J. & T. H. Mastin file answer herein, defendant F. L. Underwood files cross-bill, and complainant files reply; thereupon the cause comes on for hearing and is argued by counsel and submitted to the court and by the court taken under advisement.

Said answer of J. J. and T. H. Mastin is in words and figures as follows:

In the U. S. Circuit Court in and for the Western Division of the Western District of Missouri.

THE METROPOLITAN NATIONAL BANK OF THE CITY OF NEW YORK
vs.
BATES COUNTY NATIONAL BANK *et al.*

Defendants John J. Mastin & Thomas H. Mastin, now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be taken

to the many errors, uncertainties, and imperfections in the pleading of F. L. Underwood, Robert F. Crawford, and Jesse N. Johnson, administrator of the estate of Augustus H. Johnson, deceased, which said pleading, though styled an answer, is in the nature of a cross-bill, say, in answer thereto—

That since the bill was filed by plaintiff, to wit, on the — day of ——, 1886, *this* defendant- paid to plaintiff the sum of $— in full settlement of all debts or demands due and owing by them
236 to plaintiff and for which the mortgage sought to be foreclosed was given by them to plaintiff, and on said date plaintiff executed and delivered to them a release of said mortgage, which said release was duly filed on the 29th day of May, 1886, with the recorder of deeds in and for Jackson county, Missouri, at Kansas City, a duly certified copy of which release is hereto attached, marked Exhibit "A," and made a part hereof.

Defendant- says that after payment of said sum and after the delivery of said release all controversies were ended either between themselves and plaintiff or the other defendants, excepting only the controversy tendered by the cross-bill of the defendants, and defendants say that this controversy so tendered is solely between citizens of the State of Missouri; that the said Underwood, said Crawford, and said Crawford's administrator were at the time of filing said cross-bill all citizens of the State of Missouri.

Further answering, defendants admit as follows:

First. That a writing was drawn, dated October 20th, 1889, which was signed by said F. L. Underwood, and that the name of plaintiff, The Metropolitan National Bank of New York, was added thereto by Karnes & Ess, who are the attorneys of record of plaintiff in this suit; and defendants admit that the instrument is correctly set forth in said cross-bill, but defendants say they never signed such instrument nor have they ever signed any writing touching the matters and things in such writing contained; that there was no consideration therefor so far as they are concerned, having never received any either from the parties to said agreement or from any one else, and that they were in no way connected with said agreement nor were they parties thereto nor did they sanction or concur in the same, and they deny that they recognized or ratified the same.

237 Defendants deny that the purport or effect of said writing either was or could be to subrogate said Underwood or any other person to the rights which said Metropolitan National bank had in the mortgage hereinafter referred to or to receive a *pro rata* share or any share at all of the amount which might be realized in case a sale should take place under said mortgage.

Defendants admit that said Underwood had no interest in said agreement, but was acting as the agent of defendant- Crawford and Jesse N. Johnson, and defendants say that the money paid, mentioned in said agreement, was wholly the money of said Johnson and Crawford, the makers of the note referred to in said writing.

Defendants also admit that Johnson and the administrator of said Crawford are solely interested in said agreement.

Defendants admit that John J. and Thomas H. Mastin were endorsers of the note mentioned in said agreement, but they deny that they were such for value, but were merely such for the accommodation of the Mastin bank, never having received anything from any one for such endorsement.

Defendants admit that they were liable on account of said endorsement to the said Metropolitan National bank, but to no one else, and they admit that said note was secured by the mortgage hereinafter referred to. Defendant denies that said agreement was made in settlement of any suit against said Johnson and Crawford or against Quinlan and Montgomery, and he denies that there was any settlement at all, but that the money so paid by said Johnson and Crawford through said Underwood was simply a payment by them of the note so held by said Metropolitan National bank and nothing more.

Defendants admit that said note mentioned in said agree-
238 ment was made by Johnson and Crawford as a firm, payable to order of Quinlan, Montgomery & Co. and by them endorsed, but they deny it was delivered to John J. Mastin or Thomas H Mastin or that it was endorsed by them to the Mastin bank, but they say that the transaction whereby said note was given was between said Johnson & Crawford and the Mastin bank, and the consideration for said note was paid by said bank. Defendants admit that said Mastins under their firm name did endorse the same, but say it was done solely for the accommodation of the said Mastin bank, as hereinbefore alleged, they endorsing it to the said Mastin bank and said bank endorsing it to said Metropolitan bank, and defendants admit that it was so transferred to the last-named bank by the Mastin bank for value received by it, and defendants admit that said Metropolitan National bank was secured by the mortgage, a duly certified copy of which is hereto attached and marked Exhibit "B," but only in accordance with the terms thereof and not otherwise.

Defendants admit that the sole consideration for said note was a certificate of deposit issued by the Mastin bank on the day said note was executed and as a part of the transaction; that said certificate, at the request of said Johnson & Crawford, was made payable to one G. Baer, and that by said certificate the said bank agreed to pay to the order of said Baer $10,000 thirty days after date in New York exchange on return of said certificate properly endorsed; and defendants while denying that said certificate was the consideration of the endorsement of said note by John J. Mastin & Co., do admit that it was the consideration of the execution of the note, and that the Mastin bank when it took said note issued the said certificate of deposit therefor.

Defendants admit that said certificate was duly presented for pay-
239 ment at maturity thereof and payment demanded, at which time the Mastin bank had made an assignment to Kersey Coates for the benefit of all its creditors, and defendants admit that no part of it has been paid excepting the dividends paid by said assignee, and defendants admit said certificate was owned

and held by Johnson & Crawford at the time the aforesaid agreement was entered into, and defendants deny that the consideration for said note by reason of said things failed. Defendants deny that said John J. Mastin & Co. received anything from the Metropolitan National bank on account of its discounting said note, but it admits that by reason thereof said Mastin bank did receive $10,000. Defendants admit that at the date of the aforesaid agreement that said Coates, assignee, had paid dividends, as alleged, upon the said note and upon the said certificates of deposit, and defendants say they were paid to Johnson and Crawford or for their benefit, leaving a balance due on said note, after applying said dividends and deducting the costs of suit by Metropolitan National bank on said note, of $7,640.63, and defendants admit that said balance was paid by Johnson & Crawford to said Metropolitan National bank at the time they signed the said agreement.

Defendants deny that subsequently to the date of said agreement that a dividend of 20 per cent. was paid to John J. Mastin and Thomas H. Mastin on said note or on said certificate, or that there was any recognition, confirmation, or ratification of said agreement set forth in the cross-bill by said Mastins or either of them, and defendants say that the facts upon this point are as follows:

That at the time the note in controversy was executed and the said certificate of indebtedness was issued by the Mastin
240 bank therefor and as a part of the same transaction a negotiable promissory note, due in sixty days, dated July 18th, 1878, was executed by Johnson & Crawford for 11,185 dollars, payable to order of Quinlan, Montgomery & Co., and endorsed in like manner as the first note; that the said note was given for cash paid to the makers and payees of said note at the time of its execution and delivery to the Mastin bank; that this note was not paid when it came due, but that an allowance was made therefor in favor of the said Metropolitan National bank, the holder and owner of said note, for the full amount of said note, interest, and damages, to wit, the sum of $—, and that the same dividends were paid on the said allowance as is alleged in the cross-bill to have been paid on the allowance for the note mentioned in the said agreement (excepting the last, of 20 per cent., amounting to $4,122.08), and defendants say that said Crawford and Johnson got the benefit of said dividends, and were allowed the same by the Metropolitan National bank, and they simply paid the balance to said bank after deducting said dividends; that they never repaid the same or any part thereof to the said assignee of said Mastin bank, as they should have done, but wrongfully availed themselves of the benefits thereof.

Defendants deny that there was a dividend of 20 per cent. paid by Coates, assignee, on the note mentioned in the said agreement, and defendants deny that either Johnson or Crawford or said Metropolitan National bank were entitled to any such dividends on the said note, inasmuch as it had been paid, nor were said Johnson and Crawford entitled to a dividend on the said certificate, inasmuch as they were indebted to the assignee in a much greater sum on account of the dividends which they wrongfully as aforesaid took the

benefits of as aforesaid, and defendants say that the said
241 last dividend *was* paid was in manner following: The assets of the said Mastin bank were sold and transferred for $275,000 to Karnes for the benefit of Donnell, Lawson & Simpson, who advanced the money necessary, with the understanding that when they should be paid all money due and owing them by John J. Mastin & Co. and the money so advanced them Karnes was to hold said assets for John J. Mastin & Co.; that on all claims against the Mastin bank which were held by John J. Mastin & Co. and said Donnell, Lawson & Simpson the 20 per cent. dividend was not paid, the amount thereof being deducted from the amount so to be paid the assignee for the assets remaining in his hands, and defendants admit that said Karnes was allowed a credit in this way for 20 per cent. dividend on the certificate of deposit mentioned in the agreement, but not on the note.

Defendants admit that said Johnson has died, and that letters of administration have been duly issued on his estate by the probate court of Jackson county, Missouri, to Jesse N. Johnson, who has duly qualified as such. Wherefore defendants pray to be hence dismissed and their reasonable costs in this behalf sustained.

T. A. FRANK JONES,
C. O. TICHENOR,
Solicitors of Def'ts John J. Mastin & Thos. H. Mastin.

STATE OF MISSOURI, }
County of Jackson, } *ss:*

John J. Mastin, being duly sworn, says he knows the contents of the foregoing answer, and that the matters therein stated are true to the best of his knowledge and belief.

JOHN J. MASTIN.

Subscribed and sworn to Oct. 28, 1886.
[SEAL.] FRANK SIMPSON,
Notary Public, Jackson Co., Mo.

242 EXHIBIT "A."

Quitclaim Deed.

This indenture, made on the eighteen day of May, A. D. one thousand eight hundred and eighty-six, by and between The Metropolitan National Bank of New York, of the city and county of New York and State of New York, party of the first part, and John J. Mastin and Thomas H. Mastin, parties of the second part, witnesseth:

That the said party of the first part, in consideration of the sum of one dollar to it paid by the said parties of the second part, the receipt of which is hereby acknowledged, do by these presents remise, release, and forever quitclaim unto the said parties of the second part the following-described lots, tracts, and parcels of land lying, being, and situate in the county of Jackson and State of Mis-

souri, to wit: Forty feet (40) fronting on Fourth street by ninety feet (90) deep off the east end of lots 148 & 149, in block fifteen (15), old town, and lot two hundred and fifty (250), in block twenty-six (26), old town, except 24 feet off the east end and 24 feet off the south side and twenty-four feet by one hundred and forty-two feet (142) off the south side of the north forty-eight (48) feet of lot one hundred and sixty-five (165), in block seventeen (17), old town; also fifteen feet (15) off the north side of lot sixty-four (64) and all of lot sixty-five (65), in block twelve (12), Hubbard's addition, and lots six (6), seven (7), eight (8), nine (9), and ten (10), in block two (2), Hubbard's addition; also lots 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, and 543, in block thirty-nine (39), in McGee's addition; also ten acres of land in the city of Kansas, bounded on the north by McGee's addition, on the ea-t by Vineyard's addition, on the south by McGee place, and
243 on the west by Evan's addition; also five (5) acres of land in the city of Kansas, being the undivided one-sixteenth ($\frac{1}{16}$) part of the north half of the northwest quarter of section eight (8), township forty-nine (49), range thirty-three (33); also lots 424, 425, 426, 434, and 435, in block thirty-two (32), in McGee's addition; also the undivided one-half ($\frac{1}{2}$) interest in a block of land in McGee and Holmes' addition, 247½ feet north and south by 274 feet east and west, bounded on the west by Oak street and on the east by Locust street and on the north and south by Fourteenth street; also nine acres (9) of land off the east half of the northeast quarter of section nineteen (19), township forty-nine (49), range thirty-three (33), and two acres off the south end of the east half of the southeast quarter of section eighteen (18), same township and range; also the west half of lots 7 & 8 and the east half of lots three (3) and four (4) and the east half of the west half of lot four (4) and the east half of the west half of lot one (1), all of John Harris' subdivision of the northwest quarter of section twenty (20), in township forty-nine (49), range thirty-three (33); also 43.7 acres, described as follows: Beginning at the southwest corner of section seventeen (17), township forty-nine (49), range thirty-three (33), running thence east 1,324 feet, thence north 1,704$\frac{3}{12}$ feet to center of turnpike, thence southwestwardly with turnpike 1,434 feet, thence south 1,154$\frac{6}{12}$ feet to place of beginning, excepting from the above description ten acres (10) of land sold to — for Catholic school and church purposes; also the southeast quarter of the northwest quarter of section thirty-five (35) and twenty acres (20) off the north end of west half of the southeast quarter and the north half of the
244 north half of the southwest quarter and the northeast quarter & southeast quarter of the northwest quarter, all in section thirty-six (36), in township forty-nine (49), range thirty-three (33); also sixty-five acres (65) off the west end of the southwest quarter of section thirty-three (33), in township forty-seven (47), range thirty-three (33), and thirty-nine and $\frac{46}{100}$ ($39\frac{46}{100}$) acred off the south end of the south half of fractional section thirty-one (31) and the undivided two-thirds ($\frac{2}{3}$) interest in thirteen and $\frac{8}{10}$ acres off the north end of the south fractional half

of section thirty-one (31), and twenty acres (20) off the west end of the north half of the southwest quarter of section thirty-two (32), and ten acres (10) off the north end of the southwest quarter of the south half of the southwest quarter of section thirty-two (32), all in township forty-seven (47), range thirty-three, all the foregoing real estate situate in the county of Jackson, State of Missouri:

To have and to hold the same, with all the rights, immunities, privileges, and appurtenances thereto belonging, unto the said parties of the second part and their heirs and assigns forever, so that neither the said party of the first part nor any other person or persons for it or in its name or behalf shall or will hereafter claim or demand any right or title to the aforesaid premises or any part thereof, but they and every of them shall by these presents be excluded and forever barred, this deed of quitclaim being made in release of and in satisfaction for a certain deed of mortgage dated the seventh day of June, 1878, and recorded in the office of recorder of deeds for Jackson county, Missouri, in Book B 36, beginning at page 23, the indebtedness secured by said mortgage having been fully paid off and discharged.

In witness whereof the said party of the first part has caused its president to subscribe its *its* name hereto and has caused its
245 seal to be hereunto attached the day and year first above written.

METROPOLITAN NATIONAL BANK,
By H. A. HURLBUT, *President.*

STATE OF MISSOURI, }
County of New York, } *ss:*

On this 21st day of May, 1886, before me appeared Henry A. Hurlbut, who, being by me duly sworn, did say that he is the president of the Metropolitan National Bank of New York, and that the seal affixed to the foregoing instrument of writing is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by the authority of its board of directors, and said Henry A. Hurlbut acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office, in the city of New York, the day and year first above written. My term expires March 30th, 1888.

THOS. S. WILLIAMS,
Notary Public, New York County.

This is admitted to be a correct copy of a quitclaim deed from the Metropolitan National Bank to John J. Mastin & Thomas H. Mastin, dated May 18th, 1886, & recorded in the office of the Jackson county recorder of deeds, in Book B 159, at page 35.

JAS. F. MISTER,
Solicitor for Crawford and Others.

246 EXHIBIT "B."

Know all men by these presents that John J. Mastin and Julia Mastin, his wife, and Thomas H. Mastin and Elizabeth Mastin, his wife, of the county of Jackson, State of Missouri, for and in consideration of one dollar paid by the Metropolitan National Bank of the City of New York, in the State of New York, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant and bargain and sell, unto the said Metropolitan National Bank of the City of New York, its assigns and successors forever, the following-described real estate, situate in the county of Jackson and State of Missouri, to wit: Forty (40) feet front on Fourth street by ninety (90) feet deep off the east end of lots 148 & 149, in block 15, old town, and lot 250, in block twenty-six (26), old town, except twenty-four (24) feet off the east end and twenty-four feet off the south side, and twenty-four feet (24) by one hundred and forty-two (142) feet off the south side of the north forty-eight (48) feet of lot one hundred and sixty-five (165), in block 17, old town; also fifteen feet off the north side of block sixty-four (64) and all of lot sixty-five (65), in block twelve (12), Hubbard's addition, and lots six (6), seven (7), eight (8), nine (9), and ten (10), in block two, Hubbard's addition; also lots 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, and 543, in block thirty-nine (39), in McGee's addition; also ten acres of land in the city of Kansas, bounded on the north by McGee's addition, on the east by Vineyard's addition, on the south by McGee's place, and on the west by Evan's addition; also five acres of land (5) in the city of Kansas, being the undivided one-sixteenth ($\frac{1}{16}$) part of the north half of the northwest quarter of section eight (8), township
247 forty-nine (49), in range thirty-three (33); also lot- 424, 425, 426, 434, and 435, in block thirty-two (32), in McGee's addition; also the undivided one-half ($\frac{1}{2}$) interest in a block of land in McGee & Holmes' addition, two hundred and forty-seven and one-half feet ($247\frac{1}{2}$) north and south by two hundred and seventy-four (274) east and west, and bounded on the west by Oak street and on the east by Locust street and on the north and south by Fourteenth street; also nine acres of land off the north end of the east half the northeast quarter of section nineteen (19), township forty-nine (49), range thirty-three (33), and two acres off the south end of the east half of the southeast quarter of section eighteen (18), same township and range; also the west half of lots 7 & 8 and the east half of lots three and four and east half of the west half of lot one (1), all of John Harris' subdivision of the northwest quarter of section twenty (20), in township forty-nine (49), range thirty-three (33); also forty-three and seven-tenths ($43\frac{7}{10}$) acres described as follows: Beginning at the southwest corner of section seventeen, township forty-nine (49), range thirty-three, running thence thirteen hundred and twenty-four feet; thence north seventeen hundred and four and three-twelfths feet to the center of turnpike; thence southwestwardly with turnpike fourteen hundred and

thirty-four —; thence south eleven hundred and fifty-four and six-twelfths feet to place of beginning, excepting from the above description ten acres of land sold for Catholic school and church purposes; also the southeast quarter of the northwest quarter and the southwest — of the northeast quarter of section thirty-five (35) and twenty acres off the north end of the west half of the southeast quarter and the north half of the north half of the southwest quarter and the northeast quar-
248 ter and the southeast quarter of the northwest quarter, all in section thirty-six (36), township forty-eight (48), range thirty-three (33); also sixty-five acres (65) off the west end of the southwest quarter of section thirty-three (33), in township forty-seven (47), range thirty-three (33), and thirty-nine and forty-six one-hundredth- acres off the south end of the south half of fractional section thirty-one (31) and the undivided two-thirds ($\frac{2}{3}$) interest in the east half of the southeast quarter, section thirty-two (32), and undivided two-thirds interest ($\frac{2}{3}$) in thirteen $\frac{8}{10}$ acres off the north end of the south fractional half of section thirty-one (31) and twenty acres (20) of- the west end of the north half of the southwest quarter, section thirty-two (32), and ten (10) acres off the north end of the southwest quarter of the south half of the southwest quarter of section thirty-two (32), all in township forty-seven (47), range thirty-three (33), all the foregoing real estate situate in the county of Jackson, State of Missouri.

Also upon the following-described real estate, situate in the county of Johnson and State of Kansas, to wit:

The north half of the northwest quarter and the south half of the northeast quarter, both in section thirteen (13), and the west half of the southwest quarter of section twelve (12), all in township twelve (12), range twenty-four (24); also south half of blocks forty-five and forty-seven, block forty-six, south half of block forty-eight; block forty-nine, except lots twenty-three and twenty-four; block fifty, except lots 1, 2, 3, 4, 5, and 6; blocks 51, 52, 61, 62, 63, and 64, town of Shawnee, Johnson county, Kansas.

Also upon the following-described real estate, situated in the county of Nemaha, State of Kansas, to wit:

The southeast quarter of section three (3), the east half of
249 the northeast quarter and the south half of section twenty-two (22), and the south half of the southwest quarter of section twenty-five (25), all in township two (2), in range eleven (11); also the northeast quarter of the north half of the northwest quarter of section fourteen (14) and the northeast quarter of section fifteen (15) and the southwest quarter of section twenty-one (21) and the southwest quarter and the southeast quarter of the northwest quarter of section twenty-eight (28) and the northeast quarter of section thirty-three (33) and the southeast quarter of section thirty-four (34), all in township three (3), range eleven (11); also the northwest quarter and north half of southwest quarter of section twenty-nine (29) and the east half of the northwest quarter, section thirty-one (31), all in township five (5), range eleven (11); also the northeast quarter of section five (5) and the southeast quarter of section six

(6), both in township two (2), range twelve (12); also the northwest quarter of the north half of the southwest quarter of section eighteen (18) and the southwest quarter of section nineteen (19), all in township three (3), range twelve (12); also the southern one hundred and forty acres of southwest quarter of section twenty (20) and the northwest quarter of section twenty-two (22) and the northeast quarter of section twenty-nine (29), all in township three, range twelve; also the northeast quarter of section thirty-one (31), township four (4), and the east half of the northwest quarter of section fourteen, the east half of southeast and the east half of northwest quarter, section fifteen (15), and the east half of the southeast quarter of section twenty (20) and the north half of section thirty-three (33), all in township five, range twelve (12); also the north half of section thirty-five, township one (1), and southeast quarter of section four (4)
250 and the east half of the southeast quarter of section thirty-five (35), township five (5), all in range thirteen (13); also the southeast quarter of section five and the east half of northwest quarter of section six (6), both in township four (4), and the northeast quarter section nineteen (19), in township five (5), all in range fourteen (14); also the northeast quarter section thirty-three (33), in township three (3); southeast quarter section two (2), the northwest quarter section four (4), both in township two (2) and all in range twelve; also the south one-half of southwest quarter section eighteen (18) and the northwest quarter section nineteen (19), both in township three and range thirteen (13); also the southwest quarter section five, township two (2), range eleven (11); also the east one-half and northeast quarter of section six (6), in township two (2), range ten (10); also the northwest quarter section twenty-three (23) and the southwest quarter section twenty-eight and the southeast quarter and the east one-half of northeast quarter and west one-half of northwest quarter, in section twenty-nine (29), all in township five (5), range twelve (12); also the southeast quarter of section eight (8) and the southeast quarter of section ten (10), both in township five (5), range thirteen (13); also the northwest quarter of section six (6), township three, range fourteen (14), containing in all seven thousand three hundred acres, more or less:

To have and to hold the said described real estate, with all the rights, privileges, and appurtenances thereto belonging, unto the said Metropolitan National Bank of New York, its assigns and successors forever, and upon this express condition: Whereas the Mastin Bank of Kansas City, Missouri, is indebted to the said Metropolitan
251 National bank as endorser on various notes, drafts, and bills which the said Mastin bank has sold to said Metropolitan National bank: Now, therefore, if the said Mastin bank, its assigns or successors, shall pay or cause to be paid all notes, drafts, and bills so sold to the said Metropolitan National bank and shall pay or cause to be paid all notes, drafts, and bills which the said bank may hereafter sell and endorse to the said Metropolitan National bank, then this conveyance shall be void; otherwise in full force and virtue at law.

In witness whereof we have hereunto set our hands and affixed our seals this seventh day of June, 1878.

JOHN J. MASTIN.
THOS. H. MASTIN.
ELIZABETH S. MASTIN.
JULIA MASTIN.

STATE OF MISSOURI:

Be it remembered that on this seventh day of June, A. D. eighteen hundred and seventy-eight, before me, the undersigned, a notary public in and for the county and State aforesaid, came John J. Mastin and Julia Mastin, his wife, and Thomas H. Mastin and Elizabeth S. Mastin, his wife, who are the persons known to me to be the identical persons who executed the foregoing instrument, and acknowledged that they executed and delivered the sale as their voluntary deed and for the uses and purposes therein mentioned; and the said Julia Mastin and Elizabeth S. Mastin, being by me made acquainted with the contents of said deed, acknowledged on examination apart from their husbands that they executed the same and relinquished their dower to the real estate therein mentioned freely and without compulsion or undue influence of their said husbands. I further certify that my commission as notary public will expire on February 27th, 1883.

252 Given under my hand and notarial seal this 7th day of June, A. D. 1878.

J. H. LIPSCOMB,
Notary Public.

Filed for record and duly recorded in my office on this 7th day of January, 1879, at 2 o'clock p. m.

CHAS. D. LUCAS, *Recorder.*

The within is admitted to be a correct copy of the mortgage from John J. Mastin *et al.* to the Metropolitan National bank, dated June 7th, 1878, and recorded in the office of the recorder of deeds of Jackson county, Missouri, in Book B 36, at page 23.

JAS. F. MISTER,
Solicitor for Crawford et al.

Said replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. In Equity.

THE METROPOLITAN NATIONAL BANK OF THE CITY OF NEW YORK, Complainant,
v.
BATES COUNTY NATIONAL BANK, THOMAS H. MASTIN, JOHN J. MASTIN, and Others, Defendants. } No. 98.

The replication of Robert F. Crawford and others, complainants in the answer in nature of a cross-bill in this cause, to the answer of John J. Mastin and Thomas H. Mastin, defendants.

These repliants, saving and reservinf to themselves all and all

manner of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendants, for replication thereto saith that *he doth* and will aver, maintain, and prove *his* said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and
253 insufficient in the law to be replied unto by these repliants; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

JAS. F. MISTER,
For the Complainants, Robert F. Crawford and Others, in said Cross-Bill.

Afterwards, to wit, on February 3rd, 1887, an opinion was filed in said cause in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE METROPOLITAN NATIONAL BANK OF THE CITY OF NEW YORK
vs.
THE BATES COUNTY NATIONAL BANK *et al.*

Opinion.

BREWER, *C. J.:*

All that is left of this case is the single matter presented in the cross-bill of Underwood *et al.*

The facts, briefly, are these: Johnson and Crawford gave two notes to the Mastin bank. That bank discounted with the Metropolitan Bank of New York City. The notes were endorsed by the Mastin bank and also by John J. Mastin & Co. About the same time the Mastins executed and delivered to the Metropolitan bank the mortgage which was sought to be foreclosed in this action
254 for the purpose of securing the Metropolitan bank these and other discounts. This mortgage was the personal mortgage of the Mastins, the Mastin bank not being a party thereto. After this the Mastin bank failed—made an assignment to Kersey Coates as assignee, who proceeded to close *of* the estate of the Mastin bank.

One of the notes was paid without suit to the Metropolitan bank by the makers. Suit was brought on the other note by the Metropolitan bank against the makers and endorsers, and after suit the note was paid by the makers upon an agreement that in this foreclosure suit the Metropolitan bank should file a supplemental bill showing a partial assignment of the mort-gage, and that in any

event a foreclosure should be had for the benefit *pro rata* of these makers. While there is some dispute in the testimony, I think it is satisfactorily shown that this agreement was made with the assent of the Mastins, but still the fact remains unquestioned that the note was dead because paid by the makers, the parties primarily responsible; that the mortgage was given simply to secure discounts in favor of one of the endorsers, and when the makers had paid the note the mission of the mortgage as security for the discount is at an end. Suppose the endorsers had without suit paid this note to the Metropolitan bank. Unquestionably they could have turned around and maintained an action thereon against the makers. Can it be that the makers by paying cannot only sue the endorsers, but also foreclose a mortgage given by them? If this was all of the case there would be no question. The difficulty arises from the fact that when these notes were executed in the first instance by the makers to the Mastin bank the latter gave only part cash therefor and for the balance a certificate of deposit to one Baer, who had sold some cattle to the makers of the notes. This certificate was
255 executed by the bank alone and was in no manner a personal obligation of the Mastins, the parties to the mortgage. The day after this certificate of deposit was received by Baer he became alarmed, and at his request the makers of the notes endorsed the certificate of deposit. Before the certificate matured the bank failed, and the makers of the notes took up the certificate of deposit and held it at the time of the agreement and transactions above referred to, and the practical effort is to make this partial assignment of the mortgage operate as security for the certificate of deposit, and the claim is that equity should look behind the form, and as nothing was received for the note by the makers other than the certificate of deposit and as they now hold the certificate they should, by payment of the note, be permitted to transfer to the certificate the security of the mortgage, and the assent of the Mastins to the arrangement above referred to is claimed to be equivalent to an appropriation of the mortgage as security for the certificate and therefore entitling the makers to subrogation. It should also be stated that about the time of the payment of the first note the Mastins assured the makers that they need not worry about the paper, for the real-estate mortgage was ample security for it. Now, while there is some plausibility in the claim made by the makers and something in it which appeals to the discretion of a court of equity, and while it may be that it would be fair for the Mastins to do that which is claimed was in fact done—that is, make their personal obligations security for other debts of the bank—yet the truth is they never did anything of the kind, and to render a decree in favor of these cross-complainants on the facts as disclosed would be simply the making by the court of a contract for the parties which
256 they did not make and then enforcing that contract, and that simply upon the ground that the court thinks that the parties ought to have done so. The truth is nothing was ever said or done by the Mastins making this mortgage security for the certificate of

deposit, and the payment by the makers of the note discharged the mortgage so far as it was security therefor.

A decree must, therefore, be entered in favor of the Mastins dismissing the bill and cross-bill.

257 Said decree is in words and figures as follows:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

SATURDAY, *April 2nd*, 1887.

METROPOLITAN NATIONAL BANK OF THE CITY OF NEW YORK
vs.
THE BATES COUNTY NATIONAL BANK *et al.*

In the matter of the answer in the nature of a cross-bill of F. L. Underwood, Robert F. Crawford, and Jesse N. Johnson, administrator of Augustus H. Johnson, deceased.

This cause having come on for hearing at this term and having been argued by counsel and submitted to the court, now, the premises being duly considered, it is ordered, adjudged, and decreed that the bill of complaint herein and the answer in the nature of a cross-bill of Johnson & Crawford and F. L. Underwood be, and the same are hereby, dismissed for want of equity. It is further ordered that the complainant herein and the said cross-defendants herein pay the costs of this action and that execution issue therefor.

(Signed) DAVID J. BREWER,
Circuit Judge.

Afterwards, to wit, on Wednesday, May 18th, 1888, the following entry appear- of record:

JOHN J. MASTIN *et al.*
against
METROPOLITAN NATIONAL BANK OF NEW YORK. } 1080.

This day come complainants and say that they will not
258 further prosecute this action; whereupon it is ordered that the same be dismissed and that the defendants recover from said complainants their costs herein expended and have execution therefor.

On the hearing of said cause the following testimony was produced and read in evidence:

259 UNITED STATES OF AMERICA,
Western District of Missouri.

STATE OF MISSOURI,
County of Jackson, } *ss:*

Be it remembered that on this 16th day of April, A. D. 1886, I,

John M. Parry, a notary public within and for the county of Jackson and State of Missouri, duly appointed and qualified as such, did, under and by virtue of the several acts of Congress authorizing and regulating the taking of depositions *de bene esse* in civil causes depending in the courts of the United States, cause to come before me, at the office of the clerk of the United States circuit court, in Kansas City, in the county of Jackson and State of Missouri, and between the hours of ten o'clock a. m. and five o'clock p. m. of said day, the following persons, to wit, J. V. C. Karnes, R. F. Crawford, and C. C. Quinlan, to be examined as witnesses on the part of the defendants in the case of The Metropolitan National Bank of New York against John J. Mastin and others, which case is now pending in the circuit court of the United States for the western division of the western district of Missouri.

J. V. C. KARNES, a witness for the defendants, being duly cautioned and sworn, testified as follows:

Direct examination by J. F. MISTER, Esq.:

Q. State your name, age, and place of residence and occupation.

A. My name is J. V. C. Karnes; my age is 45 years; my place of residence, Kansas City, Missouri; my occupation is that of an attorney.

Q. Were you the attorney of the Metropolitan National Bank of New York in 1879?

A. The firm of Karnes & Ess, of which I was then a member, were the attorneys for that bank in this city.

260 Q. Were you also in 1881, 1882, 1883, & 1884?

A. We were.

Q. Were you the attorneys at the same time for John J. Mastin and Thomas H. Mastin—during that period I mean?

A. We were.

Q. Did you have in your hands for collection two notes that were held by the Metropolitan National bank?

A. There came to us in January, 1879, a large number of notes from the Metropolitan National bank to be presented to the assignee of that bank for allowance. Among those notes were two made by Johnson & Crawford and endorsed by Quinlan, Montgomery & Co. One of them was due September 19th, 1878, and the note and protest amounted to $11,186.25, and this note was allowed by the assignee for $11,475.85. The other note was due August 20th, 1878, and the note and protest amounted to $10,001.25, and this was allowed by the assignee for $10,317.72. Both of these notes were allowed at the meeting held by the assignee on January 29th, 1879, and the two days following.

Q. Will you please state the date of the two notes?

A. I have only one of the notes before me—that of $10,000—and I see that it is dated July 18th, 1878, and due in thirty days. My collection memorandum, from which I have been speaking in regard to these notes, does not show the date of them, and not having the other note before me I am not able to state its date.

Q. Will you state what you did with these notes in the way of collection?

A. These notes were both allowed, as above stated, and on one of them, that of $10,000, we collected the first dividend of $1,238.12. On the other one we collected a first dividend of $1,377.10.

261 These two dividends were paid to us on April 26th, 1879. Afterwards, on May the 20th, 1879, Quinlan, Montgomery & Co. paid to us $10,566.66, being in full of the note which was allowed for $11,475.85, and this note was then turned over to the assignee, Coates, so that he could settle with the makers for the first dividend which he had paid on it. That was our entire connection with that note.

Q. Was there any stipulation made at the time of payment of the note allowed for $11,475 with the parties to the note as to the payment of the remaining note?

A. Johnson & Crawford seriously objected to the payment of the other note, and, if I recollect right, at that time the matter was talked over and the payment of the other note by the makers and endorsers was deferred and with an understanding of this kind: The other note had been given for a certificate of deposit that had been purchased of the Mastin bank and which had never been paid by the bank and which had likewise come in for allowance and had been allowed by the assignee, and inasmuch as Johnson and Crawford had never received any benefit from this certificate of deposit they didn't wish to pay this note, and there was some agreement entered into by which the dividends on the certificate of deposit and the dividends on this other note were both to be applied in paying it off. In pursuance of that, on May 20th, 1879, Quinlan, Montgomery & Co. gave us an order on Coates for the dividend on the certificate of deposit, and which dividend amounted to $1,271.84, so that this note of $10,000 received its own dividend of $1,238.12, which was entered as a credit on it, and it also received the sum of $1,271.84, which had been allowed on the certificate of deposit, and both of these were credited on this note in pursuance of this arrangement. So many things have transpired in connection

262 with the Mastin bank that it is impossible for me to state exactly all that was said in regard to this note at that time. I know this: That at the May term of the United States circuit court, in 1879, we brought suits against nearly all of the parties who were the makers of these rediscounts so held by the Metropolitan and which we had been allowed, as above stated; but it is my recollection that suits were not brought on these two notes executed by Johnson & Crawford for the reason that it was understood that about one of these notes there was no controversy and that it would be paid off without any litigation, and which was paid off, as above stated, on May 20th, 1879, and no suit was brought on the other one for the reason that it was intended to work it out, as far as possible, by applying these dividends. I remember that we reported to the Metropolitan bank what we had done and that Mr. Seney, the president, expressed some regret that this second note, — was thus left unpaid in part, had not been sued on, and so, on September 18th,

1879, we brought suit for the balance of this note, but at the fall term of the court the case was not pressed for trial, and in January, 1880, the Mastin bank paid a second dividend of five per cent., and the amount that was coming on this note was $452.29, which was collected and credited, and on May 20th, 1880, Quinlan, Montgomery & Co. collected and paid to us on account of this note the five per cent. on the certificate of deposit, amounting to $529.94. No further action was taken at that time, and the spring term of the court, in 1880, was passed. As the fall term, 1880, of the court was approaching, we were instructed by the Metropolitan bank to say to Messrs. Johnson & Crawford and Quinlan, Montgomery & Co that the balance of this note must be paid or we would take judgment,

263 and on October 21st, 1880, an arrangement was made by us, representing the Metropolitan bank, and Johnson & Crawford & Quinlan, Montgomery & Co. by which there was paid to us the balance of the note of $7,603.50. This money was paid to us by F. L. Underwood, at that time president of the Merchants' National Bank of this city, and when this was done a written agreement was entered into, of which I herewith file a copy, marked Exhibit "A."

Since making the above statement I learn that this agreement, above referred to as Exhibit "A," is set out in full in the answer, and hence it will not be filed herewith as an exhibit, but reference simply made to the answer of Johnson & Crawford in this suit.

Q. Who were the parties to this arrangement that you have spoken of as to the $10,000 note, and did it not go beyond the application of the dividends and contemplate being made out of the proceeds of property mortgaged by John J. Mastin and Thomas H. Mastin to the Metropolitan National Bank of New York to secure the payment of this note and other indebtedness?

A. When the Mastin bank failed these rediscounts held by the Metropolitan and which were sent to us for allowance amounted to over $200,000. The Metropolitan National bank held a general mortgage on all the property of John J. and Thomas H. Mastin in the State of Missouri and the State of Kansas to protect this paper. When these claims were allowed and the condition of the bank was ascertained it was supposed that it would be necessary for the Metropolitan to look to this real estate for the payment of a large part of these rediscounts. In the year 1879 and 1880 nothing else was contemplated but that this real estate of the Mastins would all be swallowed up in the payment of this paper under this mortgage. This being the view that was taken, Johnson & Crawford and Quinlan, Montgomery & Co. and the Mastins, one or both of them,

264 had interviews at our office, in which it was fully talked over that all this real estate would be swept away, anyhow, and Johnson & Crawford & Quinlan, Montgomery & Co. insisted that *as* inasmuch as they had never received any consideration for this note, as the certificate of deposit had not been paid, that this note should be collected through this mortgage, off of this real estate, and it is my impression that in the spring of 1879, when we commenced

applying the dividends to pay off this second note, that it was then contemplated by the Mastins and other parties that for any balance that was not paid by means of the dividends that the same should be made out of this real estate; but when this fact was made known to the Metropolitan bank the objection was urged by that bank that it was unwilling to submit to that delay, inasmuch as these parties were perfectly good, and that they should pay it off, and, acting upon that general plan, it was agreed that Mr. Underwood should advance the money and stand in place of the Metropolitan National bank so far as this note was concerned. In all of these arrangements the Mastins and Johnson & Crawford and Quinlan, Montgomery & Co. conferred together quite freely and seemed to understand each other as to everything that was done, but it is absolutely impossible for me at this date to give all the particulars of the several steps that were taken.

Q. Did Mr. John J. Mastin consent to the arrangement which was made by which the money was to be made out of the mortgaged property for the payment of this note for $10,000?

A. I think he did; I know he did.

Q. I will ask further, in connection with this suit, were the Mastins defendants in this suit on this note in the circuit court of the United States, and was any pleading filed by them or either of them in that suit?

265 A. John J. and Thomas H. Mastin were both made parties to that suit, and I have no recollection of their filing any answer. I have the papers in the case before me and don't see any.

Q. Look at this note and state, if you please, in what way the Mastins were made parties (handing note to witness).

A. This note is signed by Johnson & Crawford, payable to Quinlan, Montgomery & Co., and endorsed in the following order:

First, Quinlan, Montgomery & Co.; then John J. Mastin & Co.; then, pay Metropolitan National Bank of New York. The Mastin bank, by John J. Mastin, cashier.

Said note is attached to this deposition, marked Exhibit "A," and made a part hereof.

Q. Turning to the second agreement, meaning the one referred to in the answer of Johnson & Crawford in this suit, was the money paid in pursuance of the agreement and the suit dismissed?

A. Yes, sir.

Q. I understood you to say that at the time both these agreements were made one or both of the Mastins were present and consented to them?

A. All these matters in connection with this Johnson & Crawford controversy were quite protracted and were talked over at different places at different times. I remember distinctly of the parties being together several times at our office, and I would not be able to say who was present at any particular meeting, but I feel sure of this: That everything that was done in connection with this paper was done with the approval of either one or both of the Mastins. In all of the business in connection with this bank John J. and

Thomas H. Mastin have always stood very close together, and
266 out of the hundreds of business transactions it was always entirely immaterial whether an arrangement was made with one or both of them, it was always satisfactory to the other; and, speaking in that way, I never charged my mind in any given transaction to know whether the agreement was made with both of them or with only one, and I could not say in this case whether both of them were present or whether both of them were consulted, but I know that one of them was, although I would not be able to say which one.

Q. Would you have made either of the agreements without the consent of both of them?

A. I wouldn't have hesitated to have made the agreement with the consent of only one of them, for the reason that whatever the one did the other always approved; but I would not have made the agreement without the consent of at least one of them.

Q. Would you have been free to have made an agreement which contemplated a debt of other parties to be paid out of their property or which substituted other parties for the bank in the mortgage which they had given to the bank without their sanction.

A. That presents rather a legal question. The Metropolitan National bank held a mortgage to secure this paper. Whether or not they could sell one of these claims to Mr. Underwood and substitute him to their rights as to that claim I do not undertake to answer. I can only say that what was done was with the consent of John J. Mastin & Co.

Q. Since the making and carrying out of the agreement first spoken of was it recognized by one or both of the Mastins, and when and how, if so?

A. Of course this, in connection with every other branch of the Mastin bank complications, was necessarily gone over a great many times, and it would be difficult to say in any particular way as to how this matter was referred to. It was one of those matters that seemed to be out of the way, and we had so many other
267 questions pressing themselves upon us that I don't recollect of anything being said about it so as to be able to give a definite and positive answer to that question. It is due to me, perhaps, to say in connection with this that for four or five or six years there was scarcely a day passed but what one of the Mastins or both were in our office, and of the hundreds or even thousands of claims against this bank and the many phases in which questions presented themselves, that something new was coming up for consideration almost daily, and this Johnson & Crawford matter seemed to be treated as one of those things that was not disturbing us, and so I don't recall any particular conversation had about it. In closing up the assets of the bank finally there would have been a dividend of twenty per cent. to be paid on this certificate of deposit. I don't recollect whether I receipted to Col. Coates for that or not. In closing up the business of this bank operating through other parties a very large number of the claims of the bank had been bought up, and I was directed to receipt to the assignee for the

dividend on these claims, although no dividend was actually paid on them, and whether I receipted for this as one of those I do not now recollect. Of course, the books of the assignee will show in that respect. We had before us a whole list of the claims allowed against the bank, and I went over them with Mr. Potter, who was the confidential man of the Mastins, and he would say that as we called over the claims that such and such ones we control and they were checked off, and on those no dividend was paid; and whether this certificate of deposit is one of those or not I do not recollect.

Q. Look at this letter, if you please, and statement and state if you can say more definitely as to the payments you have just referred to—the certificate of deposit heretofore referred to, and whether it was among those claimed by the Mastins as theirs.

268 A. The assets of the Mastin bank were sold out by the assignee some time in the summer of 1884, and I was the nominal purchaser, although the real purchasers were John J. and Thomas H. Mastin, or at least they were purchased in their interest. The price agreed to be paid for the assets by me was $275,000. Had I paid this money to the assignee a very large part of it would have been coming back to me again on the claims which I had bought up and held against the Mastin bank. These claims I held in the interest of John J. and Thomas H. Mastin; so instead of paying over the $275,000 to the assignee and his paying back to me again the same thing was accomplished simply by receipts, and since you have shown me the letter referred to I have no doubt that it is true that in that way I receipted for the twenty per cent. due on this certificate of deposit. That was in 1884. Some time in the spring of 1885 a controversy arose in regard to this Johnson & Crawford business, and then it was that the Mastins served on me a notice, a copy of which I furnished to Major Mister as attorney for Johnson & Crawford, and accompanying which I sent the letter referred to in the above question, and from these I am prepared to say that the twenty per cent. that would be coming to Johnson & Crawford on this certificate of deposit has been retained by the Mastins. As I before stated, why it was detained at the time I do not recollect, because it was simply one out of hundreds of claims in my hands, and the matter had not been called to my attention until the controversy arose in 1885, when Mr. Mastin furnished me this statement and served this notice.

Q. Did the Mastins receive dividends also at the time of the note of Johnson & Crawford, which was settled by the agreement with the Metropolitan National bank?

269 A. I cannot say in regard to that. When we made this settlement we had before us all of the claims that had been allowed against the Mastin bank. In cases where the parties themselves, the makers of the papers, had paid the notes, of course there was no participation in this third dividend, and whether this was treated as a note that had been paid off by the makers or not, I don't recollect.

Q. Was the twenty per cent. dividend on the note of Johnson & Crawford and others paid to F. L. Underwood?

A. My recollection is that it was not. I am sure that it wasn't paid to anybody.

Q. During the time between October 20th, 1880, and 1884, did I, as the attorney of Johnson and Crawford, not repeatedly call on you for the carrying out of this agreement made with Underwood, and did you not always, as the attorney for the Mastins, treat it as subsisting agreement?

A. I certainly did.

Q. Did they or either of them ever indicate anything to you to the contrary during that time?

A. I would like to say this: In the settlement of this Johnson & Crawford business, back in 1879 and 1880 there was some bad feeling between the parties, and when the matter was gotten out of the way that timw I can't recollect of *their* being any controversy in any way in regard to it up to the spring of 1885.

Since the adjournment at the noon hour I have been thinking over some of these matters, and while I find that I have stated above that I was sure that no dividend was paid to Mr. Underwood on this note I wish to make this further explanation on that point: What I intended to say was that I was certain that no money was paid to Mr. Underwood; but whether this note, as belonging
270 to Underwood, was embraced in the list of claims on which dividends were due, arising from the sale of the assets, and which was a twenty per cent. dividend, I am not yet prepared to state. It is my recollection, about which I feel quite sure, that I gave to the assignee in each case a separate receipt on all dividends that were allowed in that settlement, and in the files of the court, in the matter of the assignment of the Mastin bank, in the circuit court of Jackson county, Missouri, this receipt will appear, if I gave one on account of this Underwood note; and, as the receipt is the best evidence of that fact, I would simply refer to those files, and if such appears there, then it was included in the dividend list; and after further thinking over the matter I am inclined to believe that such a receipt was given, but do not undertake to be absolutely positive and could not be, in view of the large number that were given.

Q. Will you state, after consulting the files in the case of the assignment of the Mastin bank and any other sources of information within your reach, what dividends were paid on the two notes and the certificate of deposit and when and to whom paid?

A. On the note which was allowed for $11,475.85 there was paid on April 26-h, 1879, $1,377.10, and on May 20th, 1879, there was paid $10,556.66, and which paid off the note in full, principal and interest. On the other note allowed for $10,317.72 there was paid on April 26th, 1879, $1,238.12, and on May 20th, 1879, $1,271.84, and on Jan. — 1880, $452.29, and on May 20th, 1880, $529.94, and on October 21st, 1880, $7,603.50, which last amount was paid by F. L. Underwood and which was in full, so far as the Metropolitan National bank was concerned. Of the last dividend of 20 per cent. nothing was paid on the note allowed for $11,475.85, because that

had been paid off by Johnson & Crawford. There was a
271 dividend of twenty per cent. on certificate of deposit, as has been heretofore spoken of, and, as above stated, it is my recollection now that the other note allowed for $10,317.72 was also included in this last dividend list and a dividend allowed on it. The dividend of twenty per cent. on the certificate of deposit was retained and is now in the possession of John J. Mastin & Co., and if a dividend of twenty per cent. was paid on the other note that is also now in the possession of John J. Mastin & Co.

Cross-examination by T. A. Frank Jones, Esq.:

Q. In your relation to this note of Johnson & Crawford, whom did you represent as attorney?

A. When I brought suit on the note I represented the Metropolitan National bank.

Q. In receiving the dividend which was paid you by Quinlan, Montgomery & Co. on the certificate of deposit and crediting the same upon the note, whom did you represent?

A. I represented the Metropolitan National bank.

Q. To whom was this dividend paid over, and did John J. Mastin & Co. get any part of it?

A. It was paid to the Metropolitan National bank; that's all I know about it.

Q. In making the two agreements that were made with reference to this note, whom did you represent?

A. This much ought to be said in regard to that matter: Soon after the failure of the Mastin bank John J. Mastin and Thomas H. Mastin employed the two firms of Tichenor & Warner and Karnes & Ess to represent them in settling up the business of the Mastin bank. Afterwards the Metropolitan National bank likewise engaged the same parties to represent their interests, and while in some of these individual cases suits were brought by the
272 Metropolitan National bank and the Mastins were made defendants, it was in a class of cases where it was understood that there was no antagonism between the Metropolitan National bank and the Mastins, and hence it is that in reducing these claims to judgments on these rediscounts and in collecting the same we occupied the relations of attorneys for both the Metropolitan bank and the Mastins. No defence was made in any of them by the Mastins and it was understood that none would be made. In making the first agreement, or what might rather be called an arrangement than an agreement, it was generally talked over and understood between the parties themselves, and we merely reported to the Metropolitan National bank the several payments that had been made and the postponement of a suit on this paper. When the last arrangement was made we represented the Metropolitan National bank because they wanted their money, and we got the money for them and sent it to them. The whole matter was canvassed in a general way by all the parties in interest, and it was a little hard to draw the line exactly whom we did represent, as it seemed to be

mutually agreeable all around. We never charged anybody for any services except the Metropolitan National bank the usual per cent. on collection.

Q. The first agreement was that the dividends on the certificate of deposit as well as upon this note should be applied to the payment of the note, and that you were to wait for the balance and collect it out of the land mortgaged by the Mastins to the Metropolitan National bank and under the mortgage. Is that correct?

A. That is my recollection; and in the suit brought by the Metropolitan National bank against Johnson & Crawford & others subsequently there was an answer filed in this court, and attached to the answer I find an exhibit in the handwriting of Mr. Ess,
273 which sets out substantially what the agreement was.

Q. And it was in pursuance of this agreement that Quinlan, Montgomery & Co. paid you the first dividends on the certificate of deposit?

A. On this they paid us both the first and second dividends on the certificate.

Q. Please state, as far as you know, what was the consideration, advantage, or inducement for John J. Mastin & Co. to agree that their land should pay a note made by Johnson & Crawford, endorsed by Quinlan, Montgomery & Co., and then subsequently endorsed by them.

A. That question can best be answered by stating something of the history of this matter. In the spring of 1879 things were very stormy with the Mastins. John Mastin had been indicted, but had had his trial and been acquitted. There were a large number of attachment suits pending, pressing for trial. The State treasury matters were in an exceedingly complicated condition. To the May term, 1879, it was our intention to bring suit on all these rediscounts, but before doing so it is my recollection that we notified the parties of our intention to sue. About that time, at our office, No. 16 West 5th street, in this city, Judge Quinlan, representing Quinlan, Montgomery & Co., and either Johnson or Crawford, or both of them, and one or both of the Mastins had several interviews. I know in a general way that there was bad feeling in regard to this note. Johnson & Crawford contended that they had never received any consideration for it, and that they ought not to be called upon to pay it, and, while I have no recollection of hearing an angry word spoken, it was generally understood that threats of
274 violence by Johnson & Crawford had been made, and it was talked of at that time, I feel certain, by the Mastins that they were so surrounded by difficulties at that time that they had no disposition to complicate their matters by personal altercation; and, as has been heretofore stated in this deposition, it seemed to be then generally conceded that this Mastin land would have to be sold to pay these rediscounts, and this being the case, as we supposed, Johnson & Crawford insisted that the Metropolitan should wait and obtain all the money possible out of these dividends, both on the note and the certificate of deposit, and collect the balance out of the mortgage. I know that Mr. John Mastin urged upon us that we

adopt that course, and said that the Metropolitan National bank would be perfectly safe, and that it would satisfy Johnson & Crawford and relieve him from an embarrassing situation, and under those circumstances, feeling that there was no danger to the Metropolitan bank, we adopted the first arrangement. Those are the facts, so far as I recollect them.

Q. Did John J. Mastin & Co. receive any valuable consideration from Johnson & Crawford because of their agreement to pay this note?

A. None that I know of. I know nothing more than what I have stated.

Q. Even after receiving the dividend paid you by Quinlan, Montgomery & Co. you didn't consider this agreement binding upon the Metropolitan National bank, did you?

A. The agreement was acted upon to the extent that no suit was brought to the May term, 1879, in the United States circuit court. I recollect quite distinctly that the Metropolitan bank people were not satisfied that the matter had gone over term, and in the
275 fall of 1879 suit was brought.

Q. Did John J. Mastin & Co. receive any valuable consideration for assenting to the second agreement as entered into after the suit was brought or any consideration at all other than that which existed at the time the first agreement was entered into?

A. I find that suit was brought September 21st, 1879, on this note to recover a balance, and at the October term of that year and also at the May term, 1880, the case was continued. What was the reason for these continuances I cannot now recall, but in October, 1880, the balance of this note was paid off, and it is my recollection that we then informed the parties that the Metropolitan National bank declined to wait any longer and that we would have to take judgment at that term, and that then it was that this second arrangement was made and the money paid to us by Mr. Underwood for the Metropolitan National bank and the suit was dismissed. These are the facts so far as I recollect them, and whether or not these constitute a consideration I do not pretend to answer.

Q. There was no other consideration than that set out in this case?

A. I don't recollect anything else in connection with it other than what I have stated.

Q. Was the assent and concurrence in this agreement of John J. Mastin & Co. considered essential at the time it was entered into; and, if so, why did they not sign the agreement as parties?

A. I can't answer whether or not it is considered essential. I only know that they did concur in what was done. Whether it was done right or not I do not undertake to say.

276 Q. Are you positive that John J. Mastin & Co. or either member of that firm had knowledge of the particular terms of this agreement before it was executed by the parties thereto?

A. I feel quite sure that they did; and yet I do not recall any particular incident or remark in connection with it.

Q. From the time that this agreement was executed up to the

time that you became the purchaser of the assets of the Mastin bank was anything done under or because of this agreement that you know of or affecting the rights of the parties to it or of John J. Mastin & Co. in that respect?

A. I would say this: That on a number of different occasions Major Mister, as attorney for Johnson & Crawford, or both of them, came to see how the matter was working out and made inquiries about when the business would be closed, and inquiries were also made several times by E. E. Wilson, who was in some way connected with the administration of Johnson's estate, about the same matter, and also inquiries were made by R. L. Yeager, as representing some claim that he had upon this fund in some way growing out of some litigation that he was interested in with Mr. Crawford; and all of these inquiries that I recollect I uniformly made the reply that the foreclosure which had been brought by the Metropolitan National bank on this mortgage was hanging fire, growing out of the fact that efforts were making in other ways to settle up the business. I do not recollect that any of these gentlemen ever made specific inquiries as to what was doing, but inquired frequently as to the progress that was making in getting the business settled.

Q. In your direct examination you have said that you were only a nominal purchaser of the assets of the Mastin bank.
277 Please state fully whom you represented in that transaction and what your relation was towards such parties and what their relations were with each other, as far as you know, and any other facts in connection therewith.

A. That is easier to ask than it is to answer. Antedating the failure of the Mastin bank there were complicated business relations existing between that bank and the firm of Donnell, Lawson & Simpson, of New York, and into these complications, by the failure of the Mastin bank, the Metropolitan National Bank of New York was also drawn. To settle up this business existing between John J. Mastin & Co., the Mastin bank, Donnell, Lawson & Simpson, and the Metropolitan National bank it became necessary that the affairs of the Mastin bank should be closed. As a part of this plan Donnell, Lawson & Simpson, of New York, instructed me to proceed to buy up claims against the Mastin bank, and which I did, and bought up very largely; and the money for making these purchases I obtained by drawing drafts on L. V. Stiles, care of Donnell, Lawson & Simpson, 102 Broadway, New York. I only know that those drafts were paid, and with this money I bought up these claims. It was my understanding that I held these claims for Donnell, Lawson & Simpson, and when I bought in the assets for $275,000 I bought them in nominally in my name, but lying back of me was the firm of Donnell, Lawson & Simpson, and, as I understood, this purchase was a part of the plan between them and John J. Mastin & Co. for the settlement of the entire business relations between these parties, as above stated.

Q. In making that purchase did you not directly and primarily represent Donnell, Lawson & Simpson?

A. I did.

278 Q. Were you not instructed by Donnell, Lawson & Simpson to receipt to Coates, assignee, for the twenty per cent. dividend which this purchase enabled him to make upon the claims which you had so purchased without receiving any actual money, the amount so receipted for to be taken as a part of the $275,000 which you were to pay for the assets?

A. That's correct.

Q. Were you not further instructed by the Metropolitan National bank to receipt in the same manner for the dividends upon the allowed claims which they had against the Mastin bank assets?

A. That's correct.

Q. I will get you to state if you receipted for the dividends made upon the certificate of deposit referred to in your direct examination or if you receipted for the dividend upon this note of Johnson & Crawford; whether you considered that you did so under the instructions of Donnell, Lawson & Simpson or of the Metropolitan National bank.

A. Along during the progress of the Mastin bank settlement now and then, in one way or another, the Metropolitan bank or Donnell, Lawson & Simpson or the Mastins would obtain control of some claim or claims in different ways. In making this final settlement of the amount to be paid out of this $275,000 a full list of all the claims which had been allowed against the Mastin bank was made out. The man of all others who was most familiar with all the details of this business was J. W. Potter, who had formerly been a book-keeper for the Mastin b-nk and who had always been the confidential man of John J. Mastin & Co. and to whom all of us looked for information in making settlements. I remember of going over this list with Mr. Potter, and he would indicate the parties
279 who were entitled to receive a dividend out of this $275,000, and for those parties the money was paid over to the assignee, and on account of such other claims as he would say that we owned or controlled simply receipts were given and the matter settled in that way. With the details of the business Thomas H. Mastin was very much more familiar than John J. Mastin, and, while he was consulted with frequently, it is my recollection that I closed the matter practically through the assistance of Mr. Potter. There have been a few cases of small claims come up since where it has been found necessary to make some corrections, but in the main everything was satisfactory.

Q. For a year or more previous to your purchase of the Mastin bank assets had not Mr. Potter's chief employment been the purchasing of claims against the Mastin bank under your superintendence, and had you not paid him therefor by drafts upon Donnell, Lawson & Simpson?

A. He had formerly been a subordinate of mine in that business, but I think that for quite awhile before the sale of the assets that he had been working for the Traders' bank, but whenever we got in a close place we always consulted him. About the employment by the Traders' bank I am not absolutely certain and don't know that it is material, but that is my recollection. Anyhow Mr.

Potter was engaged for a long time in aiding and buying up claims.

Q. So far as you know did either John J. Mastin or Thomas H. Mastin have any knowledge of the receipting by you for the dividends on this certificate of deposit or upon this note of Johnson & Crawfords or of your intention to so receipt until after it was done, if it ever was done?

A. It would be impossible for me to answer that. I do not
280 recall anything that was said specifically about this claim.

Q. The receipts for these dividends, if they were given, do not indicate any money actually received by you, but were taken as so much in payment for the assets of the Mastin bank by Kersey Coates, assignee. Is that the fact?

A. That's so.

J. V. C. KARNES.

Subscribed and sworn to before me this 16th day of April, A. D. 1886. My commission expires September 24th, A. D. 1889.

[SEAL] JOHN M. PARRY,
Notary Public, Jackson Co., Mo.

281 In the case of The Metropolitan National Bank *vs.* The Bates County National Bank *et al.*, pending in the circuit court of the United States for the western district of Missouri, and which a bill in the nature of a bill in intervener has been filed by Johnson & Crawford, I have heretofore given my deposition, and there was one portion of it about which I was requested to make further examination in order to answer more fully. This further inquiry was made some time ago, and now I undertake to make this further statement to be read in connection with said deposition. It is this:

The assets of the Mastin bank were nominally sold to me for $275,000. In making this purchase I was acting immediately for Donnell, Lawson & Simpson and the Metropolitan National Bank of New York, but with the understanding that when John J. Mastin & Co. had settled with the Metropolitan National bank and Donnell, Lawson & Simpson that then whatever there was in the transaction would enure to the benefit of *of* John Mastin & Co., and in this way I was practically acting in making this purchase for John J. Mastin & Co. A large portion of the claims against the Mastin bank had been bought up—most of them through my intervention, and I held them—and, instead of my paying $275,000 over to Coates, assignee, and then having him pay back to me on the several claims I held, the settlement was brought about in this way: That there was a full statement made up by E. R. Hunter, acting for Coates, together with Judge Brumback, Coates' attorney, and Mr. Potter, acting for the Mastins, and the claims were all figured up, as it was understood they existed against the bank—both those which had been bought up and those which were held by the original claimants—and on this statement there was a dividend
282 declared of twenty per cent., and I simply paid over to Coates

enough money to pay this twenty per cent. dividend on the claims which had not been bought up. In making up this statement the Johnson & Crawford note, which had been taken up by F. L. Underwood, was treated as having been paid off by the makers, and hence it was not taken into consideration at all in that transaction, but it was treated as a paid note, and the per cent. of dividend was figured on the basis that this note had been paid off. The certificate of deposit which had been given to Johnson & Crawford and for which one of these notes had been given, amounting to $10,000, ought to have received a dividend of twenty per cent., amounting to somewhere about $2,000. That was a valid and subsisting claim, and I find that in receipting to Coates, assignee, that I also receipt for this the same as though it had been one of the claims that I held, when as a matter of fact I ought not to have receipted for it, and this money ought to have been paid over to the holders of this certificate of deposit.

283 The Circuit Court of the United States, Western Division of the Western District of Missouri, Eighth Judicial Circuit.

THE METROPOLITAN NATIONAL BANK OF NEW YORK, Plaintiff,
vs.
A. H. JOHNSON, ROBERT F. CRAWFORD, CORNELIUS C. QUINLAN, Payton Montgomery, Alexander Fraser, John J. Mastin, and Thomas H. Mastin, Defendants.

The plaintiff says that on July 18th, 1878, and long prior thereto it was duly incorporated and organized under and by virtue of an act of the Congress of the United States approved June 3d, 1864, and entitled "The national bank act," and has ever since been engaged in the banking business in the city of New York, and has always been and is now a citizen of the State of New York, and the matter in dispute in the cause hereinafter stated, exclusive of costs, exceeds the sum of five hundred dollars.

Plaintiff says that on said July 18, 1878, the above-named defendants, A. H. Johnson and Robert F. Crawford, were partners in business under the firm name of Johnson & Crawford, and at said date defendants Cornelius C. Quinlan, Payton Montgomery, and Alexander Fraser were partners doing business under the firm name of Quinlan, Montgomery & Co., and likewise at said date the defendants John J. Mastin and Thomas H. Mastin were partners in business under the firm name of John J. Mastin & Co. The Mastin bank was a corporation duly organized under the laws of the State of Missouri.

284 Plaintiff says that the said Johnson & Crawford by their firm name executed and delivered to the defendants Quinlan, Montgomery & Co., by their firm name, their certain promissory note, herewith filed, dated July 18, 1878, by which they promised, thirty days after the date thereof, to pay to the order of said Quinlan, Montgomery & Co. two thousand dollars at the Metropolitan National bank, New York, value received, and afterwards and

before the maturity of said note, for value received, the said Quinlan, Montgomery & Co. by their firm name indorsed and delivered said note to John J. Mastin & Co., and afterwards, before maturity, for value received, the said John J. Mastin & Co. by their firm name endorsed and delivered said note to the Mastin bank, and afterwards, before maturity, for value received, the said Mastin bank endorsed and delivered said note to the plaintiff, who thus became and is the legal owner and holder thereof.

On the maturity of said note the plaintiff presented the same to the makers & demanded payment, which was refused, and said note was thereupon duly protested for non-payment; all of which the said Quinlan, Montgomery & Co. and said John J. Mastin & Co. and said Mastin bank had due notice; and the certificate of protest, duly verified, is herewith filed. Plaintiffs say- that on May 21st, 1879, the defendants Quinlan, Montgomery & Co. paid on said note the sum of twelve hundred and seventy-one $\frac{84}{100}$ dollars ($1,271.84), and the balance, together with interest at seven per cent. and damages of protest, remain unpaid, and for which plaintiff asks judgment.

KARNES & ESS,
TICHENOR & WARNER,
Pl'ff's Att'ys.

285 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE METROPOLITAN NATIONAL BANK OF NEW YORK, Plaintiff,
vs.
A. H. JOHNSON *et al.*, Defendants.

I. The said defendants, Quinlan, Fraser, Montgomery & Crawford, for answer to plaintiff's petition, admit that said Johnson & Crawford made said note and that Quinlan, Montgomery and Company endorsed the same, but they deny each and — other allegation in the said petition contained.

II. And the said defendants, for a second and further defense, say that on the 20th day of May, 1879, there was paid on said note the sum of twelve hundred and seventy-one and $\frac{84}{100}$ dollars, and on said day there was paid on said note by these defendants the further and additional sum of twelve hundred and seventy-one and $\frac{84}{100}$ dollars.

III. And these defendants, for a third and further defense, say that said note was made by said Johnson and Crawford and endorsed by said Quinlan, Montgomery and Company and delivered to said Mastin bank and to said John J. Mastin and Company in consideration and for a certificate of deposit on said 18th day of July made by said The Mastin bank, whereby said The Mastin bank acknowledged that one G. Baer had on that day deposited with said The Mastin bank the sum of ten thousand dollars, which said The Mastin bank thereby promised to pay to the order of said G. Baer on the

return of said certificate of deposit properly endorsed, payable
286 thirty days after date in New York exchange, and which said certificate of deposit these defendants and their said firms respectively did, at the request of said The Mastin bank and said John J. Mastin and Company, endorse for the accommodation of said bank and said John J. Mastin and Company and without any consideration therefor paid whatever; that although said certificate of deposit was duly presented for payment at the maturity thereof at said The Mastin bank and payment thereof demanded, yet said bank had then suspended and did not pay the same or any part thereof, and their respective firms were obliged to and did pay the same; and by reason of all which matters and things the consideration of said note sued on has wholly failed, and of all matters hereinbefore set forth plaintiff well knew when it became the owner of said note sued on, and that it, the said plaintiff, did not become the owner thereof until long after the same become due, and then took the same with full knowledge of all the matters before stated, and these defendants say that said note sued on was not presented for payment at the maturity thereof, nor did these defendants have any notice of the non-payment thereof; and these defendants further say to secure the payment of the note sued on, as well as the other note hereinafter set forth, said John J. Mastin did make and deliver to said plaintiff a mortgage on certain lands, lots, and houses in the county of Jackson and State of Missouri and on certain lands in the State of Kansas of which he was the owner and which said plaintiff now holds, and which property is of the value of two hundred thousand dollars and more; that on the 20th day of May, 1879, the said plaintiff, in consideration that defendants would and did pay on the note sued on the sum of 1,271.84 dollars, and would and then did pay to the plaintiff in full a certain other note made by said Johnson and Craw-
287 ford and dated also the said 18 July, 1878, and payable to said Quinlan, Montgomery & Company in thisty days, for the sum of 11,185.00 —, and which said plaintiff then held, and in consideration that these defendants disputed and denied their liability on the note sued on, the said plaintiff did agree to and with these defendants to endeavor and use its best efforts to make the money out of said mortgage, and which said agreement is herewith filed; and these defendants say that said plaintiff keeps and retains the money so by it received, and has not and does not make any effort to collect said debt out of said mortgage, as it agreed to do, but refuses so to do. Wherefore these defendants ask judgment for their costs herein laid out and expended.

F. M. BLACK,
Att'y for Def'ts.

288 Afterwards, to wit, on the 21st day of October, 1880, the following entry appears of record:

THE METROPOLITAN NATIONAL BANK
against
A. H. JOHNSON *et al.* } 112.

This day comes the plaintiff and dismisses this cause at its own costs.

289 R. F. CRAWFORD, a witness for the defendants, being duly cautioned and sworn, testified as follows:

Direct examination by J. F. MISTER, Esq.:

Q. State your name, age, place of residence, and occupation.

A. 44 years old; I reside in Kansas City; I am sometimes in the cattle business and sometimes I am not; my name is R. F. Crawford.

Q. In July, 1878, what were you doing, Mr. Crawford?

A. I was in the cattle business.

Q. Alone or with others?

A. Mr. Johnson and I owned some cattle together about that time.

Q. Did you and Johnson together have a transaction with the Mastin bank in July, 1878, in connection with a purchase of cattle made by you and him; and, if so, what was the transaction?

A. Yes, sir; we bought some cattle of Mr. Baer, of Texas. In paying for those cattle we got $10,000 or $11,000 in money from the Mastin bank. In addition to that we got a certificate of deposit from the Mastin bank for $10,000, for which we gave our notes, with Quinlan, Montgomery & Co. as endorsers.

Q. See if that is one of the notes, Mr. Crawford (handing witness note attached to Mr. Karnes' deposition, marked Exhibit "A").

A. This is one of the notes, dated July 18th, 1878.

Q. Both of the notes are of that date, are they not?

A. Yes, sir.

Q. Is this the certificate of deposit of the same date?

A. Yes, sir.

Q. Is that it (handing paper to witness)?

A. Yes, sir.

Q. Who was Mr. Baer, and how is it that the certificate was issued to him? Explain that.

290 A. Mr. Baer was a cattle man, in the cattle business, and we bought some cattle from him, and this money we got from the Mastins we paid to him for those cattle. We also gave him this certificate of deposit as part payment, and we gave the Mastin bank those two notes. On one of the notes we got the money, and for the other we got this certificate of deposit. The notes were due about thirty days. Before thirty days expired the Mastin bank busted—made an assignment.

Q. Was it agreed between you and Johnson, Quinlan, Montgomery & Co., Baer, and the Mastin bank that a part of the consideration would be taken in shape of a certificate of deposit instead of the money?

A. Yes, sir.

Q. Before the maturity of this certificate of deposit the Mastin bank had assigned?

A. Yes, sir.

Q. What became of the certificate of deposit?

A. Immediately after this transaction Mr. Baer became a little uneasy about this certificate and wanted Johnson & myself and Quinlan, Montgomery & Co. to endorse the certificate, which was done. *The* prior to the maturity of the note and the certificate the Mastin bank had a collapse. Mr. Baer came to us to pay this certificate as endorsers, which we did—Johnson & myself. We paid it through Quinlan, Montgomery & Co. — their office. Then when the notes were due we paid the notes—one of them—at maturity, but refused to pay the other, because we had paid the certificate, and the Metropolitan bank sued us.

Q. Who did you pay that to?

A. I don't remember who we paid it to—the Mastins or Coates, assignee.

291 Q. At the time of paying the larger note was there any arrangement made as to the remaining note; and, if so, what was it, and with whom?

A. We had some talk, Mr. Johnson & myself and Quinlan, Montgomery & Co., with John J. Mastin; probably Mr. Tom Mastin was present once in the bank.

Q. When was that?

A. That was when the note was due and shortly after the collapse of the Mastin bank; and Mr. John J. Mastin told us that we never should lose anything; that we should have every dollars of our money back. Then my impression is on that we paid the first note. I don't remember that there was any agreement made at the time. We went and hun*d*ted John J. Mastin up—Johnson, myself, and Judge Quinlan, and, I think, Judge Black. We found him and went to Karnes & Ess' office together, and if we would pay this note they agreed—Karnes & Ess and Mastin agreed—they would pay us back or secure us in the mortgage that the Metropolitan National bank held on the Mastin bank. When that agreement was made John J. Mastin, Johnson, & myself and Mr. Quinlan were in Ess' office, on 5th street, and we paid that note. They agreed to use their best effor*s*t to make the money for us—the Mastins did.

Q. Make it how?

A. Out of the mortgaged property.

Q. What occurred afterwards with reference to that note of $10,000?

A. The Metropolitan National bank sued us for it. We refused to pay it. By this time the Mastin bank had paid some dividends; then we got the benefit of those dividends by an agreement made with us and the Mastins—John J. Mastin. Those dividends were deducted from the amount of the note and interest. Then Mas-

292 tin agreed we should have our money out of this property this Metropolitan National bank had a mortgage on. The agreement was to secure us and to dismiss provided we would pay the note.

Q. When was this agreement carried out?

A. I don't remember the date exactly.

Q. About when?

A. I think it was some time in 1880.

Q. You were not here when it was carried out with Underwood?

A. No, sir; I was not here when the written agreement was made with Underwood.

Q. When did you first know of it, then?

A. About the time the agreement was made. When the talking was done, and I was here, and after the money was paid I went off. When we paid the money it settled the suit that was brought against us by the Metroplitan bank. I went off, I believe, on my ranch, in Indian Territory.

Q. Who furnished the money to make the settlement?

A. We got the money from Mr. Underwood, and Quinlan paid for me—Quinlan, Montgomery & Co. paid it for me.

Q. Have you paid it to them since?

A. Yes.

Q. Have you said anything to either of the Mastins since about it; if so, when?

A. I have talked with John J. Mastin a number of times about it.

Q. Well, what was said—the substance of it?

A. He always told me the money was safe secured by that mortgage, and that I would get my money if anybody else did; that my claim was the first. That's about all John J. Mastin said any time.

Q. Now, about that time did John J. Mastin say this to you?

293 A. A number of times after these agreements were made. I never talked with Tom Mastin but once on the subject that I remember of.

Q. When was that, and what was said?

A. I think a year and a half or two years ago. He says, I suppose you will get your money all right, and I think he went on to say, I suppose you have got rich—or something of that kind—since you lost your money; and he said there was no doubt but what I would get it. He said it was secured was about all he said.

Q. How did they seem to understand it to be secured?

A. By virtue of the agreement that had been made.

Q. Did you receive any part of the dividend paid on the certificate of deposit by the assignee of the Mastin bank except by credits on $10,000 note?

A. No, sir.

Q. Were the dividends on the $10,000 note and the certificate of deposit coming from the Mastin bank credited on that note?

A. I don't remember.

Q. Do you remember the consultation in Karnes' office in which there were some words between you or Johnson and one or both of the Mastins; and, if there were, what was said?

A. I don't remember of ever having any words with either of the Mastins at any place or any time.

Q. Do you know of any words between Johnson & them at any

time or any place indicating violence, either in language or otherwise?

A. No, sir; I do not.

Q. Is there anything else connected with this matter that you wish to state?

294 A. No; there is nothing. John J. Mastin always pledged his word and honor to me that I never should lose the money.

Q. Do you mean the money you paid to Baer?

A. We owed them $20,000. We paid seven thousand six hundred and some dollars more than we owed after deducting all the dividends that we received. John J. Mastin always told me I should have the money back and he would see to it that I got it.

Cross-examination by T. A. FRANK JONES, Esq.:

Q. What did you give Mr. John J. Mastin for promising that he would see to it that you got your money back under the mortgage?

A. Well, when we paid the money John J. Mastin said if we would settle this note th-t he would see that we got our money.

Q. Didn't you have to settle it? Wasn't the bank suing you?

A. We didn't know whether we did or not. We wouldn't have done it, I don't believe, if we hadn't got this agreement, unless we had to.

Q. Did you ever pay Mr. Mastin anything for promising that you should get your money?

A. No, sir; Mr. Mastin done it voluntarily.

Q. Why did you call on him to see that you didn't lose your money?

A. Because he had sold our note—had discounted our note to the Metropolitan National Bank of New York that we got no value received for.

Q. Did you ask him to see that you didn't suffer any loss for the reason that he was the manager of the Mastin bank, and that you had lost your money in the Mastin bank?

A. I asked him because I thought he had got $10,000 of our money for nothing.

Q. Why did you think that?

A. Because we gave our note to the Mastin bank for this certificate, and the Mastin bank wouldn't pay the certificate, and I

295 looked on it in my rough way as Mastin being the bank.

Q. And that's the reason you asked him to make good your loss?

A. Yes, sir.

Q. And that is the only reason, so far as you know, that he promised to make it good?

A. Well, at the time, from the way John J. Mastin talked to me, I believed he wanted to make it good; hence I felt perfectly easy about the matter being paid.

Q. Weren't you and Mr. Johnson or one of you about that time threatening to shoot Mr. John J. Mastin if you had any loss in the Mastin bank?

A. I don't think either one of us ever made such a threat. I don't remember of it. I do remember one transaction. Mr. Johnson and I got in my buggy and drove out to the Mastin place intending, if we could see them, to say that we would consider them indebted to us for five days and no longer. We didn't find the Mastins, either one of them; didn't get to see them. On our return to the city—this was before any of the agreements was made—in talking over the matter among ourselves, we agreed to see Mr. Mastin and get some agreement in writing by which we could get our money. He had said to us verbally that we shouldn't lose anything, but we resolved to get something in writing; and after the agreements were made we felt perfectly secure.

Q. Did you understand that he gave you an agreement in writing?

A. He did do it.

Q. What has become of that agreement?

A. There they are (referring to agreements in suit).

Q. What were you going to do that time you went out to his house if he didn't agree to pay you in five days?

296 A. We didn't intend to demand him to pay us in five days. We intended to say to him that we would consider him indebted to us for five days. Tha-'s all we intended to say.

Q. Did you or did Mr. Johnson say to Judge Quinlan that you would shoot John J. Mastin if that money wasn't paid?

A. I don't know what Mr. Johnson said. I know what I said. I think I have always said that the Mastins shouldn't enjoy my money. But I thought that the whole thing was secure and all fixed up.

Q. When the suit was brought against you by the Metropolitan National bank you and Mr. Johnson raised the money and paid off that note through Mr. Underwood, did you not?

A. Judge Quinlan paid the money for me, my part of it.

Q. He gave the money to Underwood for you?

A. Yes, sir; I presume he did. I was there when the checks were drawn.

Q. It wasn't Underwood's own money that he was paying for it?

A. It was his own money this far: We had to secure him for it.

Q. Since then you have paid off this debt?

A. Yes, sir.

Q. You have stated in your direct examination that Mr. Baer, after the certificate of deposit of the Mastin bank had been issued, asked your firm and Quinlan, Montgomery & Co. to endorse it for him. How long was that after you delivered it to him in payment for *that* the cattle that he sold you?

A. It was the next day.

Redirect examination by J. F. MISTER, Esq.:

Q. You were not here when this written agreement was made by the Metropolitan National bank and Underwood?

A. No, sir; I was not here when it was reduced to writing.

297 Q. Have you ever seen it anywhere?

A. I saw it two weeks after it was made.

Q. You didn't know who had signed it until you saw it?

A. No; I didn't know anything about who had signed it until I saw it. We wanted something, the way we talk, in black and white. Then we got to Karnes & Ess' office, on 5th street, and Karnes wrote the first agreement, or Ess, in their office, and it was read to us. John M. Mastin was present. That's as far as I looked into it. I understood that Mr. Karnes was representing the Metropolitan National bank. I didn't look to see whether John J. Mastin signed it or not. I thought Karnes knew his business. Now, as to the second agreement, so far as the writing was concerned, I never saw until probably two weeks after it was made. Johnson and I had talked with John J. Mastin—Mr. Quinlan. When this $7,000, this last money, was paid the money was divided up into checks, each one furnishing his portion, and I went off down to my ranch. When I came back to Kansas City first Johnson said he had got our Mastin business nailed tight, and said, Come down to Underwood's; I want to show it to you; and we went to Underwood's, and Johnson showed it to me. That's the first time I saw it. The next time I saw it was in your office—probably a year and a half or two years ago.

R. F. CRAWFORD.

Subscribed and sworn to before me this 16th day of April, A. D. 1886. My commission expires September 24th, A. D. 1889.

[SEAL.] JOHN M. PARRY,
Notary Public, Jackson Co., Mo.

298 C. C. QUINLAN, a witness for defendants, being produced, sworn, and examined, deposeth and saith:

Direct examination by J. F. MISTER, Esq.:

Q. State your name, age, residence, and business in July, 1878.

A. C. C. Quinlan; 51 years; residence, Kansas City; occupation, commission merchant.

Q. Were you a member of the firm of Quinlan, Montgomery & Co. at that time?

A, Yes, sir.

Q. Do you know the transaction with the Mastin bank in July, 1878, by your firm and Johnson & Crawford to get money to pay for cattle purchases; if so, what was it?

A. About that time Mr. Johnson & Mr. Crawford came to me and told me they had bought a certain bunch of cattle from Mr. Baer, and they wanted me to make arrangements to get them twenty-odd thousand dollars. I told them I would try. I went up alone and talked to Mr. Mastin. He told me he could let me have $11,000 and a certificate of deposit for $10,000. I went to the Pacific hotel and reported. Mr. Johnson reported ot to Mr. Baer, and he accepted the proposition. We all then went to the Mastin bank, and I endorsed two notes. I was very busy at that time, and I left the

bank and went to my place of business. The next day Mr. Johnson came to my office with this certificate of deposit. He told me Mr. Baer was not satisfied, and wanted us to endorse it. I remarked to him I didn't like endorsing. He said that Crawford and himself had promised to satisfy Mr. Baer, and requested me to endorse. I endorsed it.

Q. Look at this and see if it is the one you speak of (handing paper to witness).

A. I suppose, sir, that's the one.

299 (Paper attached to deposition and marked Exhibit "B.")

Q. Can you say what happened in reference to the certificate of deposit and the notes?

A. Some time after the Mastin bank closed its doors Mr. Baer came up and claimed payment on that certificate of deposit, claiming that payment had been refused. After consulting several days with Mr. Crawford & Mr. Johnson — agreed to pay it. I can't say that I saw it paid, but I know it was satisfied.

Q. Now, if you know anything further connected with the $10,000 note state it.

A. My memory is very indistinct on this whole transaction. I recollect that Mr. Crawford and Mr. Johnson refused to pay it on the ground that this certificate of deposit ought first to be settled. I don't remember whether this was after the suit was brought or not.

Q. Was one of the notes paid without controversy; and, if so, was there any agreement made then as to the remaining note? If there was, what is it, if you know?

A. I don't remember. I was there with Mr. Crawford and Mr. Johnson and Mr. Black, at Mr. Karnes' office, and Mr. John J. Mastin was there. There was an agreement made with Karnes & Ess, at the request of Mr. Mastin, that a part of the proceeds in the hands of the Metropolitan bank should pay this $10,000 certificate. I don't know that I saw any writing; I think not.

Q. You were not present when the agreement that we have spoken of here as the second agreement was made between Underwood and the Metropolitan National bank?

A. No, sir; I think not.

Q. Do you know of the money being paid on that agreement?

A. All I recollect is this, that the money was paid. Mr.
300 Johnson came to my office and told me the matter was placed in Mr. Underwood's hands. I find from my books that I paid Mr. Underwood two thousand eight hundred and some dollars and charged it to Mr. Crawford.

Q. Do you know whether John J. Mastin took any part in this second agreement?

A. Yes, sir. I met him several times in Karnes & Ess' office with Mr. Johnson & Mr. Crawford and Judge Black. He appeared to be anxious to have the matter settled.

Cross-examination by T. A. FRANK JONES, Esq.:

Q. In your conversation with Mr. John J. Mastin what did you say to him about Johnson & Crawford having made threats in regard to him if that thing was not satisfied?

A. I forget any of that conversation that I ever had with Mr. Mastin.

Q. In that connection do you recollect telling him that Johnson was a dangerous man?

A. I know that there was a good deal of anger expressed, and I may have repeated some of it to him at that time.

Redirect examination by J. F. MISTER, Esq.:

Q. You do not remember of communicating any angry threats from Mr. Johnson or Mr. Crawford to him?

A. Not that I remember.

C. C. QUINLAN.

Subscribed and sworn to before me this 16th day of April, 1886. My commission expires Sept. 24th, 1889.

[SEAL.] JOHN M. PARRY,
Notary Public, Jackson Co., Mo.

301 EXHIBITS.

"A."

UNITED STATES OF AMERICA, } ss:
State of New York, }

On the 20th day of August, in the year of our Lord one thousand eight hundred and seventy-eight, at the request of the Metropolitan National bank, I, William H. Connell, a notary public, duly commissioned and sworn, dwelling in the city of New York, did present the original instrument hereto annexed to a person in charge at the place where the same is made payable, in the city of New York, and demanded payment thereof, which was refused.

Not good.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the maker and endorsers of the said instrument as against all whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred for want of payment of same.

Witness my hand and official seal at said city.

W. H. CONNELL,
[SEAL.] *Notary Public.*

Endorsed: $10,000
1 25
10,001 25
Johnson & Crawford, for Metropolitan National bank. Protest.

Aug. 20, 1878. Fees, &c., $1.25. W. H. Connell, notary public, New York. Mastin bank: Please serve notices on all parties the day you receive this protest.

302 EXHIBITS.

"A."

$10,000.00. KANSAS CITY, Mo., *July* 18, 1878.

Thirty days after date we promise to pay to the order of Quinlan, Montgomery & Co. ten thousand dollars at Metropolitan Nat. bank, New York, value received.

No. 11529. Due Aug. 20.

JOHNSON & CRAWFORD.

Endorsed as follows:

Quinlan, Montgomery & Co. John J. Mastin & Co. Pay Metropolitan Nat'l bank, New York. The Mastin bank, by John J. Mastin, cash. Paid on within note twelve hundred and seventy-one $\frac{84}{100}$ dollars by Quinlan, Montgomery & Co. May 21, '79. Karnes & Ess, att'ys. Paid by K. Coates, ass'g.—Ap'l 26, '79, 1st div., 1,238.12; Jan 8, '80, 2 div., 452.29. E. 163. Aug. 20th, 1878. Protested for non-payment. W. H. C., N. P.

303 NEW YORK, *Aug.* 20, 1878.

Please to take notice that a promissory note made by Johnson & Crawford for $10,000, dated July 18th, 1878, payable thirty days after date, and endorsed by you, having been this day presented for payment, which was duly demanded, but refused, is protested for non-payment, and the holders look to you for the payment thereof. Enclosed are notices for previous endorsers, which please examine and serve without delay.

Yours, &c., W. H. CONNELL,
Notary Public.

(Box 2973, P. O., N. Y.)

To John J. Mastin & Co.

NEW YORK, *Aug.* 20, 1878.

Please to take notice that a promissory note made by Johnson & Crawford for $10,000, dated July 18th, 1878, payable thirty days after date, and endorsed by you, having this day been presented for payment, which was duly demanded, but refused, is protested for non-payment, and the holders look to you for the payment thereof. Enclosed are notices for previous endorsers, which please examine and serve without delay.

Yours, &c., W. H. CONNELL,
Notary Public.

(Box 2973, P. O., N. Y).

To John J. Mastin, cash'r.

304 UNITED STATES OF AMERICA, *State of New York,* } ss:

I, William H. Connell, a notary public, duly commissioned and sworn, dwelling at the city of New York, do hereby certify that on the 21st day of August, 1878, due notice of the presentment and protest of the original promissory note hereto annexed (by notice partly written and partly printed, signed by me) was given by me to the several endorsers of said promissory note in the manner following, namely, viz., by depositing notice in the post office at the city of New York (prepaying the postage thereon), directed as follows:

Quinlan, Montgomery & Co., Kansas City, Mo.;
John J. Mastin & Co., do.
John J. Mastin, cashier Mastin bank, Kansas City, Mo.,

enclosing with the last duplicate noticed for the endorsers, Quinlan, Montgomery & Co. and John J. Mastin & Co., each of the above-named places being the reputed place of residence of the person to whom such notice was addressed and the nearest post office thereto.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of New York, this twenty-first day of January, one thousand eight hundred and seventy-nine.

[SEAL.] W. H. CONNELL,
Notary Public.

STATE OF NEW YORK, *City & County of New York,* } ss:

I, William H. Connell, being duly sworn, depose and say that the statements contained in the foregoing certificate are true.

W. H. CONNELL.

Sworn to before me this 22nd day of January, 1879.

THOS. S. WILLIAMS,
Notary Public, N. Y. Co.

305 EXHIBIT "B."

STATE OF MISSOURI, *County of Jackson,* } ss:

Be it known that on the dat and the date hereof, at the request of Mr. I. M. Smith, cas., the holder of the original certificate of which a true copy is above written, I, J. H. Lipscomb, notar*t* public within and for the county of Jackson and State of Missouri, residing in the city of Kansas, in said State, presented the same during the usual hours for business for such purposes to K. Coates, assignee in charge at Mastin bank, and demanded payment thereof, which was refused; whereupon I, the said notary public, at the request aforesaid, have protested and do hereby solemnly protest against all persons and every party concerned therein, whether as maker, drawer, drawee, acceptor, payor, endorser, guarantee, surety, or

otherwise howsoever, against whom it is proper to protest for all exchange, re-exchange, costs, damages, and interest suffered or to be suffered for want of payment thereof, of all which I have given due notice to the parties concerned, as follows: By written notices, in due form, to Johnson & Crawford, Quinlan, Montgomery & Co., delivered to the book-keeper of Quinlan, Montgomery & Co. at the Kansas City stock yards; also notice to Ball, Hutchings & Co. & G. Baer, Johnson & Crawford, sent by U. S. to Ball, Hutchings & Co. at Galveston, Texas.

Thus done, at the city of Kansas aforesaid, this 20 day of August, A. D. 1878; and I further certify that I was qualified as such notary public on the 28th day of February, 1883.

In testimony whereof I have hereunto set my hand and affixed my notarial seal.

J. H. LIPSCOMB,
Notary Public.

Recorded Book D, page 292.
Notary's fees, $2.50.

306 No. 4945.

KANSAS, Mo., *July* 18, 1878.

G. Baer has deposited in the Mastin bank, Kansas City, Mo., ten thousand dollars, payable in c'y to the order of himself on return of this certificate, properly endorsed, thirty days after date, payable in New York exchange.

$10,000.00. Aug. 20.

JOHN J. MASTIN, *Cashier.*

Countersigned:
W. H. WINANTS, *Tel.*

Protested for non-payment Aug. 20, '78.
J. H. LIPSCOMB, *Notary.*

Endorsed: Johnson & Crawford. Quinlan, Montgomery & Co. Pay to Quinlan, Montgomery & Co. G. Baer. Paid on this claim May 21, 1879, twelve hundred & seventy-one & $\frac{84}{100}$ dollars, being first dividend paid by the assignee of the Mastin bank, and said amount was endorsed as part payment of note of Johnson & Crawford, on which Q., M. & Co. are endorsers. Paid May 17, 1880, $529.94, which am't endorsed on note of Q., M. & Co. held by Metropolitan Nat. b'k. Without recourse. K. Coates, assignee, p'r Wood.

307 KANSAS CITY, Mo., *Feb.* 23*rd*, 1885.

Maj. James F. Mister.

DEAR SIR: As requested by you on Saturday, I at once sent word to Mr. Mastin that I wanted to see him, and this morning Thos. H. Mastin called at the office, and I stated to him that you had made demand for the last dividend of 20 per cent. on the certificate of deposit held by Johnson & Crawford. He admitted that this was correct, but said that the first dividend of 12 per cent. on the undis-

puted note paid by Coates had never been returned, and upon his theory of this matter he also made claim for the other two dividends paid on the second note, and said that they must both be paid back with interest, and that when that was done he would allow the 20 per cent. dividend on the certificate. I asked him to put the matter in shape, so that you could understand just the claim made, which he did, and gave me a copy, accompanying the same with a notice that I was not to pay over this 20 per cent. in any other way. Enclosed I hand you a copy of this account and notice. Of course, it is unpleasant for me to be drawn into this controversy, but I see no way to avoid it, and unless you and they succeed in making some settlement of course there is nothing left to do but to fight it out in the courts.

Very truly, J. V. C. KARNES.

308 *Amounts Paid by K. Coates, Assignee, on Notes of Johnson, Crawford & Co.*

Note, $10,317.72, p'd April 26th, 1879	1,238 12
" 11,475.85, p'd April 26th, 1879	1,377 10
Int. to February 26th, 1885, at 6 per cent.	915 31
Note, 10,317.72, p'd January 8th, 1880	452 29
Int. to Feb. 26th, 1885	139 26
	4,122 08

Mr. J. V. C. Karnes.

MY DEAR SIR: Johnson & Crawford are indebted to you, as the assignee of the Mastin bank assets, in the above amount, and when they are ready to pay the same to you, you will allow them a credit of two thousand (2,000) dollars, being the third dividend on certificate for $10,000.

Yours, &c., JOHN J. MASTIN & CO.

Feb. 23rd, 1885.

309 STATE OF MISSOURI, } *ss:*
County of Jackson, }

I, John M. Parry, a notary public within and for the county of Jackson and State of Missouri, duly commissioned, qualified, and acting as such under and by virtue of the several acts of Congress authorizing and regulating the taking of depositions *de bene esse* in civil causes depending in the circuit and district courts of the United States, do hereby certify that the witnesses whose depositions are above set forth are material and necessary to the proper determination of the said cause in the caption set forth and described.

I do further certify that I was attended at taking of said depositions by T. A. Frank Jones, Esq., attorney for John J. Mastin and Thomas J. Mastin, and James F. Mister, Esq., attorney for R. F. Crawford, and by G. W. McCrary, Esq., attorney for the Metropolitan National Bank of New York, and also by J. V. C. Karnes, R. F.

Crawford, and C. C. Quinlan, the witnesses, who were of sound mind and lawful age and who were by me sworn and examined and their examination by me reduced to writing and subscribed by the witnesses in my presence on the day, at the place, and between the hours in that behalf first aforesaid. I do further certify that I am not of counsel nor attorney for either of the parties to the suit in controversy or in any way interested in the event of said suit. My commission as notary public expires September 24th, A. D. 1889.

In witness whereof I have hereunto set my hand and seal this 16th day of April, A. D. 1886.

[SEAL.] JOHN M. PARRY,
Notary Public, Jackson County, Mo.

310 STATE OF MISSOURI, } ss:
County of Jackson, }

Deposition of witness produced, sworn, and examined before me, John M. Parry, a notary public within and for the county of Jackson and State of Missouri, on the 13th day of May, 1886, at the office of the clerk of the circuit court of the United States for the western division of the western district of Missouri, at Kansas City, Mo., in a certain cause now depending in the circuit court of the United States for the western division of the western district of Missouri, wherein Metropolitan National Bank of New York *et al.* are complainants and Bates County National Bank *et al.* are defendants, on the part of defendants Johnson & Crawford.

F. L. UNDERWOOD, being duly sworn, testified as follows:

Direct examination by Major MISTER:

Q. State your name, age, residence, and occupation in 1880—in October of that year.

A. Frank L. Underwood; 41 years of age; banker; residence, Kansas City; in 1880 I was president of the Merchants' National bank, in Kansas City.

Q. Do you know of a transaction about that time between Johnson & Crawford and Quinlan, Montgomery & Co. on one side and the Metropolitan National Bank of New York and John J. Mastin and Thomas H. Mastin on the other side? And, if you had any part in or connection with it, state all you know concerning it.

A. Mr. Johnson, who was a personal friend of mine, came to me in October, 1880, and stated that suit was being brought upon the note which he had made to the Mastin bank and which he
311 desired to take up in connection with Mr. Crawford, who was also a principal upon the note. He represented to me that this note was in the hands of Messrs. Karnes & Ess, as attorneys for the Metropolitan National Bank of New York, and he wished to get it into his possession and be relieved of the liability to the Metropolitan National bank. He and Mr. Quinlan furnished me the

money, and I bought the claim of Messrs. Karnes & Ess and took an assignment from them of the claim and executed a declaration to Messrs. Johnson & Quinlan that it was bought with their money, and that I held it in trust for them. I had one or two interviews with Mr. Karnes in connection with the matter.

Q. Can you tell who represented the Mastins or either of them in the transaction, if any one?

A. I cannot state from my personal knowledge, although I had the impression and got the understanding in some way that Karnes & Ess also represented them.

Q. With reference to the agreement referred to in your answer to the second question, was the stipulation or the written agreement as between you, as the representative of Johnson & Crawford, and Quinlan, Montgomery & Co. carried out by the payment of the money on the one side and the dismissal of the suit on the other or not?

A. It was, so far as the payment of the money was concerned, and I suppose that the suit was dismissed as to Johnson & Crawford.

(Agreement referred to is produced, marked Exhibit "A," and attached to this deposition.)

Q. Have you, as assignee of the note from the Metropolitan National bank, received any *pro rata* from the proceeds of mortgaged property mentioned in the said agreement?

A. No payment has ever been made to me personally upon this note.

312 Have you received as such assignee any part of the twenty per cent. dividend paid October, 1884, to the creditors of the Mastin bank?

A. I do not recollect of having received any such dividend. I know that I did not.

FRANK L. UNDERWOOD.

Subscribed and sworn to before me this 13th day of May, 1886.

[SEAL.] JOHN M. PARRY,
Notary Public, Jackson Co., Mo.

EXHIBIT "A."

KANSAS CITY, MO., *Octo. 22nd*, 1880.

I have this day bought with the money of A. W. Johnson and C. C. Quinlan a claim based on note of Johnson & Crawford for $10,000, endorsed by Quinlan, Montgomery & Co. & J. J. & T. H. Mastin, on which certain payments have been made by the dividends of the Mastin bank. This claim is in suit against Mastins in the hands of Karnes & Ess, and said Johnson & Quinlan are entitled to the said claim and all dividends made upon it, and this shall operate as an assignment of said claim.

F. L. UNDERWOOD.

313 This agreement, made and entered into this 20th day of October by and between the Metropolitan National Bank of New York, party of the first part, and F. L. Underwood, party of the second part, witnesseth:

First. That the said party of the first part, as endorsee from the Mastin bank of Kansas City, Missouri, is the owner and holder — a certain promissory note executed by Johnson & Crawford to Quinlan, Montgomery & Co., and by said Quinlan, Montgomery & Co. endorsed, and upon which said note there is a balance due of principal and interest at this date of $7,603.50, and for which suit is now pending in the circuit court of the United States at Kansas City.

Second. On said note John J. Mastin and Thomas H. Mastin are also endorsers, and to secure the payment of the same with other liabilities said Mastins executed to said party of the first part a mortgage on certain real estate in Missouri and Kansas, and to foreclose said mortgage suits are now pending, one in the circuit court of the United States at Kansas City, Missouri, and one in the circuit court of the United States at Topeka, Kansas.

Third. For and in consideration of the sum of $7,603.50 paid to said party of the first part by said party of the second part, and the payment of all costs in said suit thereon, said note so executed by said Johnson & Crawford has this day been assigned and transferred without recourse to said party of the second part.

Fourth. It is also further agreed as a part of said assignment and transfer that the said party of the second part shall release and hereby releases all claim or interest in so much of said mort-
314 gage as covers the real estate therein described and lying in the State of Kansas; but as to the land lying in the State of Missouri and covered by said mortgage the said party of the second part shall retain his interest therein in consideration of the release of the Kansas lands as aforesaid; and the said party of the first part stipulates and agrees that in said foreclosure proceedings in Missouri it will file a supplemental bill showing this assignment of said note and to which said party of the second part agrees to enter his appearance and make proper answer or plea thereto, so that the same may be determined as a part of said foreclosure and so that said party of the second part may obtain such orders as he may deem necessary and proper to obtain a *pro rata* division of the proceeds arising from the decree of foreclosure.

Fifth. In all matters pertaining to said mortgage, whether by foreclosure or otherwise, it is agreed by and between the parties hereto that the same shall be managed exclusively by said party of the first part without any interference or hindrance by said party of the second part: Provided, however, that nothing shall be done to impair or affect the right of said party of the second part to receive his *pro rata* share of whatever sum may be realized by the foreclosure or otherwise from the Missouri lands.

Sixth. It is also further agreed by and between the parties hereto that except as to the Kansas land so released as hereinbefore recited said party of the second part shall be entitled to receive on said

note a *pro rata* share on any other security held by said party of the first part for this and other indebtedness of said John J. Mastin and Thomas H. Mastin.

Executed in duplicate the day and year aforesaid.

THE METROPOLITAN NATIONAL BANK
OF NEW YORK,
By KARNES & ESS, *Att'ys.*
F. L. UNDERWOOD.

315 STATE OF MISSOURI, } ss:
County of Jackson, }

I, John M. Parry, a notary public within and for the county of Jackson, in the State of Missouri, duly commissioned, qualified, and acting as such, do hereby certify that there came before me, at the office of the clerk of the United States circuit court, in the custom-house, in Kansas City, Missouri, Frank L. Underwood, who was by me first sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined and his examination reduced — writing by me, and was subscribed and sworn to before me by said witness on the day, at the place, and in the behalf aforesaid. I further certify that I was attended at the time of taking said depositions by James F. Mister, on behalf of said defendants Johnson & Crawford, and by T. A. Frank Jones, Esq., on behalf of defendants John J. Mastin and Thomas H. Mastin. I do further cert-y that I am not of counsel or attorney for either of the parties to the suit in controversy or in any way interested in the event of said suit. My commission will expire September 24th, 1889.

In witness whereof I have hereunto set my hand and notarial seal this 26th day of February, A. D. 1886.

JOHN M. PARRY, [SEAL.]
Notary Public, Jackson County, Mo.

316 THOMAS H. MASTIN, a witness for defendants, being duly cautioned, sworn, and examined, deposes as follows:

Direct examination by T. A. FRANK JONES, Esq.:

Q. You are a member of the firm of John J. Mastin & Co. and were formerly assistant cashier of the Mastin bank?

A. Yes, sir.

Q. Do you remember a note for $10,000 made by Johnson & Crawford to the order of Quinlan, Montgomery & Co., discounted by the Mastin bank for Johnson & Crawford, and afterwards rediscounted by the Metropolitan National bank for the Mastin bank?

A. I do.

Q. State, if you know, the circumstances under which this note was discounted and what consideration, if any, Johnson & Crawford received for making the note.

A. Johnson & Crawford made two notes at the same time, one for ten thousand and one for eleven thousand and something more.

They received for these notes from the Mastin bank a certificate of ten thousand dollars and the remainder in cash.

Q. State next under what circumstances and for what consideration, if any, these notes were endorsed by John J. Mastin & Co.?

A. John J. Mastin & Co. received nothing for endorsing the notes. Their endorsement was made for the purpose of having the notes rediscounted by the Metropolitan National bank.

Q. Did John J. Mastin & Co. endorse the notes at all before they were discounted by the Mastin bank?

A. They did dot.

Q. At the time of the maturity of these notes to whom did they belong?

A. To the Metropolitan National bank, which had purchased them by rediscounting them for the Mastin bank.

317 Q. Give the history of these notes, so far as you know it, since their maturity.

A. I don't know much about their history.

Q. What efforts, if any, were made, to your knowledge, by the Metropolitan National bank to collect them and through whom?

A. Karnes & Ess, attorneys for the Metropolitan National bank, had these two notes, together with a large number of other notes, for collection. It is my impression one of these notes, the larger one, was paid before suit was brought on it by Johnson & Crawford. The other, I understand, was paid after suit had been brought on it by Johnson & Crawford.

Q. What, if anything, do you know about an agreement alleged in the cross-bill of Johnson & Crawford to have been made by which the smaller of these two notes was to be paid out of the proceeds of the land mortgaged by John J. and Thomas H. Mastin to the Metropolitan National bank and under that mortgage?

A. I understood that Johnson & Crawford were in a very angry mood soon after the failure of the Mastin bank on account of these notes and that John J. Mastin had said to Quinlan that these notes were endorsed by John J. Mastin & Co. and that that endorsement was secured by a mortgage on our property in Jackson county and on property in the State of Kansas, and that the notes would be paid out of that security.

Q. Do you know of any other or further agreement than this?

A. This is all I know of the agreement in refereuce to these notes.

Q. Did you personally make any agreement either with Johnson & Crawford or with Karnes & Ess for the Metropolitan National bank in regard to this matter?

A. I never did.

318 Q. There is attached to the deposition of Mr. Karnes in this case as an exhibit a communication addressed to him and signed by John J. Mastin & Co. and reading as follows:

"Mr. J. V. C. Karnes:

"My Dear Sir: Johnson & Crawford are indebted to you, as the assignee of the Mastin bank assets, in the above amount, and when

they are ready to pay the same to you you will allow them a credit of $2,000, being the third dividend on certificate for $10,000.

"Yours, &c., JOHN J. MASTIN & CO."

Please state why and under what circumstances this was written.

A. About two or three days before this time Mr. Karnes said to me that Major Mister had demanded of him the third dividend on this $10,000 certificate in dispute. The dividend amounted to $2,000. He said he didn't know whether he had receipted for it or not; he supposed he had; Major Mister said he had, and asked me to have Mr. Potter see whether he did or not. I inquired of him if Johnson & Crawford had ever repaid to Coates, assignee, the dividends which he had paid on these notes in controversy. He said he didn't know, but that I had better have Mr. Potter look up the whole matter. Mr. Potter examined Coates' books and reported to me that the dividend had been receipted for by Mr. Karnes and that Johnson & Crawford had never repaid the dividends to Coates which he had paid on their notes. I then asked Mr. Karnes if the assets which he then had did not have a claim against Johnson & Crawford for the amount of these dividends paid by Coates on their notes. He was of the opinion that they did. I then wrote him the note which has been given above.

Q. Why was this note written by John J. Mastin & Co.? Was that firm the owner of the assets of the Mastin bank?

A. They were interested in the assets; Mr. Karnes held
319 them first for Donnell, Lawson & Simpson; after that for John J. Mastin & Co.

Q. At the time these notes of Johnson & Crawford were discounted by the Mastin bank it was a duly incorporated bank under the laws of Missouri, was it not?

A. Yes, sir.

Q. What was its capital?

A. $250,000.

Q. Who were its officers and who were its directors, as far as you recollect?

A. Seth E. Ward, president; David O. Smart, vice-president; John J. Mastin, cashier; Thomas H. Mastin, assistant cashier. The directors were the above-named officers, H. L. McElroy, Bernard Corrigan, W. R. Bernard, M. R. Platt, and perhaps one or two others.

Cross-examination by Major MISTER:

Q. You say that John J. Mastin & Co. did not endorse the notes at all before they were discounted by the Mastin bank. Their endorsement appears to be on the note prior to that of the bank. How do you account for this, and how do you know that they did not endorse it before it was discounted?

A. We had an arrangement with the Metropolitan National bank that we would endorse all the paper sent to it for rediscount by the Mastin bank, and always in sending paper on their for discount it was endorsed by John J. Mastin & Co. before being sent to it. It is

in this way that the name of John J. Mastin & Co. is on the back of that note. The same endorsement was on all of the paper held by the Metropolitan National bank against the Mastin bank. I know it was not endorsed before discounted by the Mastin bank, because I was an active officer of the bank and was very familiar with all its transactions, and, while I do not recollect the writing of the name
320 of John J. Mastin & Co. on the back of that note or know whether the name was written there by John J. Mastin or myself, I know that there was no reason why *why* we should have endorsed this note for Johnson & Crawford and Quinlan, Montgomery & Co., and as a matter of fact that we never did so.

Q. It is only because of this that you say you know it was not endorsed before it was discounted by the bank?

A. The reason for saying that this note was not endorsed by John J. Mastin & Co. before it was discounted by the Mastin bank is as stated in the answer to the previous question.

Q. Might it not have been endorsed because of the acceptance of the certificate of deposit from the Mastin bank instead of money?

A. No, sir. In that case we would have been endorsing Johnson & Crawford and Quinlan, Montgomery & Co. to the Mastin bank.

Q. You say that you understood that the note for $10,000 was paid, after suit had been brought on it, by Johnson & Crawford, and that John J. Mastin had said to Quinlan that these notes were endorsed by John J. Mastin & Co., and that that endorsement was secured by a mortgage, and that the notes would be paid out of that security. Please state what source you had this understanding from and whether it referred either to the agreement made by Karnes & Ess, heretofore referred to, or to the agreement made by the Metropolitan National bank with Underwood, and what knowledge you had, if any, of either of these agreements.

A. The understanding I spoke about refers to neither of these agreements. It refers to a time very soon after the suspension of the Mastin bank. John J. Mastin told me that Judge Quinlan had been to him and said that Johnson & Crawford were in a great rage about this matter, and that they were very dangerous men; that he had said to Quinlan that John J. Mastin & Co. had endorsed
321 these notes, together with the rest of the notes held by the Metropolitan National bank, and that these notes were secured by a mortgage on our property, and that the notes would be paid in that way.

Q. Did he say that both notes would be paid out of this security, and did he agree that they should be paid out of this security, or was the agreement limited to the $10,000 note, if any was made?

A. I presume the $10,000 note was meant.

Q. Did either Karnes or Ess or Johnson & Crawford at any time say anything to you about the agreement made by Karnes & Ess in one instance and the Metropolitan bank with Underwood in the other; and, if they did, what did you say or do, if anything?

A. Johnson nor Crawford never spoke to me in regard to this matter. Karnes or Ess or perhaps both said to me at some time that John J. Mastin had said to Johnson & Crawford that this note

could be paid out of this property. My answer to them was that I would have said nothing of the kind to them. I have no recollection about either one of the agreements referred to; at the time they were made——

Q. What was the occasion of Mister's demand on Karnes for the dividend on the $10,000 certificate of deposit?

A. I suppose it was because he was the attorney of Johnson & Crawford.

Q. Had any demand of this sort been made for this dividend previous to this?

A. Not that I know of.

Q. Shortly before this demand did you not, when called upon by Mister in company with Karnes, disavow any liability under the Underwood agreement, and claim that your firm was in no way bound by it?

A. I did.

322 Q. Except under this agreement did Karnes, as purchaser of the assets of the Mastin bank or those he represented as agent, have any right to the dividend on this certificate of deposit?

A. He had no rights under the Underwood agreement, and I don't know whether he represented the parties who were entitled to that dividend, but think he did not, unless Coates, assignee, was entitled to retain it, and by reason of this purchase he was entitled to it.

Q. How do you think Coates, assignee, was entitled to retain it?

A. Coates, assignee, had paid dividends on the notes of Johnson & Crawford to the Metropolitan National bank, amounting to $4,122.08, which I think would give him a claim against Johnson & Crawford for this amount, thus entitleing him to hold the dividend to be applied in part payment.

Q. Was not the Metropolitan National bank holder of the note at the time of the payment of the dividend to its attorneys and entitled to receive them?

A. Yes, sir; I presume so.

Q. Did the certificate of deposit ever belong to the Mastin bank or to the Metropolitan National bank?

A. Not to my knowledge.

Q. Do I understand you to admit that the twenty per cent. dividend upon the certificate of deposit was received and accounted for to John J. Mastin & Co?

A. No, sir; I did not say so.

Q. What was meant, then, by authorizing Karnes, as holder in trust of the assets of the Mastin bank, to allow Johnson & Crawford a credit of $2,000 on account of the dividend on that certificate?

323 A. Karnes had purchased the assets of the Mastin bank from Coates, assignee. The assignee had paid him in dividends on the notes of Johnson & Crawford $4,122.08. Coates was owing Johnson & Crawford a dividend of twenty per cent. on the $10,000 certificate of deposit, which left Johnson and Crawford in-

debted to the assets $4,122.08, less the dividend, amounting to $2,000.

Q. How were Johnson & Crawford indebted to the assets of the Mastin bank for the dividends, which had been rightfully turned over to the Metropolitan National bank?

Objected to for the reason that it calls for conclusions of law.

A. The dividends were paid to the Metropolitan bank on the notes of Johnson & Crawford. The assignee was bound to pay these notes or pay dividends on them by reason of his endorsement, and as a matter of law was entitled to recover the dividends which he had paid on these notes from Johnson & Crawford, the makers thereof.

Q. Did the firm of John J. Mastin & Co. claim as theirs whatever dividends were due on the note of $10,000 and the certificate of deposit heretofore referred to, and if dividends were due by reason of the sale of the assets of the bank on this note and certificate did they get the menefit of them either by concession from Karnes or in any other way?

A. They have never received any dividends on this certificate and note. I wrote a note to Karnes, saying that I thought Johnson & Crawford were not entitled to a dividend upon this certificate, because Coates had paid a greater amount in dividends on their notes held by the Metropolitan National bank.

Q. In saying in the note to Karnes that Johnson & Crawford are indebted to you (Karnes), as the assignee of the Mastin bank
324 assets, for the dividends which have been paid over to the Metropolitan National bank, and instructing him to allow them a credit of $2,000 for the third dividend on the certificate for $10,000, did you not intend to assert the right to these dividends in your firm?

Objected to on the ground that it calls for a conclusion of law.

A. It was my idea that Johnson & Crawford, after being allowed a credit for the $2,000 dividend, was still in debt to the assets, because the assignee had paid a greater amount in dividends on the notes held by the Metropolitan National bank against them. I didn't think that we were entitled to this in any other way and never claimed that we were.

Q. Did the assets of the Mastin bank belong to John J. Mastin & Co. at the time of the writing of this note?

A. At this time Donnel, Lawson & Simpson held the assets as security for whatever John J. Mastin & Co. might owe them. After that debt was paid the assets were to come to John J. Mastin & Co.

Q. Subject to this were they the owner- of the assets?

A. They were first to go to Donnell, Lawson & Simpson for the payment of our debt to them. Mr. Karnes held them as their property, but we had an agreement with Donnell, Lawson & Simpson by which they should come to us when this debt was paid.

Q. Under this agreement you felt free to make the directions which were given to Karnes?

A. Yes, sir; I felt no embarrassment in making them.

Redirect examination by T. A. FRANK JONES, Esq.:

Q. Did John J. Mastin & Co. direct or authorize Mr. Karnes to receipt for a dividend in this certificate of deposit?

325 A. They did not.

Q. Did John J. Mastin & Co. know at the time that Karnes had receipted for this dividend?

A. They did not.

THOS. H. MASTIN.

Subscribed and sworn to before me this 20th day of April, A. D. 1886.

JOHN M. PARRY, [SEAL.]
Notary Public, Jackson Co., Mo.

326 JOHN J. MASTIN, being duly cautioned and sworn as a witness on behalf of the defendants, deposeth and saith:

Direct examination by T. A. FRANK JONES, Esq.:

Q. State in full all that you recollect of any conversation had between you and either Johnson or Crawford, of the firm of Johnson & Crawford, or between you and J. V. C. Karnes in reference to the payment of a note of $10,000 made by Johnson & Crawford and by the Mastin bank endorsed to the Metropolitan National bank and all that you know, if you know anything, with respect to a certain agreement between the Metropolitan National bank and F. L. Underwood by the terms of which the said Underwood was to be subrogated to the rights of the Metropolitan National bank as to the mortgage executed by John J. Mastin and Thomas H. Mastin to the Metropolitan National bank to the extent of the said note for $10,000.

A. I will go backwards on that question and commence at the bottom first. I had no knowledge of any contract by which Underwood was to be subrogated to the rights of the Metropolitan National bank in regard to the $10,000 note. I don't remember that I ever had any conversation with Johnson & Crawford with regard to the matter at all. I did have conversation, one or more, with Judge Quinlan in regard to this note, but as to just what was said or the language that was used I haven't any recollection. Before the execution of this note by Johnson & Crawford I had made the Metropolitan National bank a mortgage on certain real estate in this State and the State of Kansas to secure the payment of the paper I had endorsed for the Mastin bank, which the Metropolitan National bank had discounted or might discount thereafter, and while I don't remember what was said to Judge Quinlan in regard to this note I expect it was the understanding that the property that was

327 mortgaged to the Metropolitan National bank would be disposed of or sold and the proceeds applied to the payment of the paper that the Metropolitan bank had discounted for the Mastin bank.

Q. For what amount of indebtedness did this mortgaged land stand security?

A. Something over $200,000.

Q. Before the date of the execution of this agreement between the Metropolitan National bank and F. L. Underwood had you been sued and judgment taken against you for a large part of this indebtedness?

A. I had, I suppose. I don't know the date of that agreement.

Q. At the time of the execution of this agreement was suit pending in this court for the foreclosure of this mortgage?

A. I presume that it was. I don't know anything about that agreement. I don't know when it was entered into.

Q. Did you make any other agreement with Quinlan or Johnson & Crawford or have any other understanding with them in regard to this matter further than telling them that the property mortgaged to the Metropolitan National bank would be sold and the notes paid out of the proceeds?

A. I didn't make any agreement. My impression was, as before stated, that the property would be sold, and I supposed that the proceeds would be applied to the payment of the notes that were endorsed by John J. Mastin & Company, and no doubt so stated to him.

Q. Did you ever collect or authorize any one for you to collect a dividend of twenty per cent. from Kersey Coates, assignee of the Mastin bank, upon a certificate of deposit for $10,000 issued by the Mastin bank to one Baer and endorsed by Johnson &
328 Crawford and Quinlan, Montgomery & Co. or upon the note above?

A. No, sir.

Cross-examination by JAMES F. MISTER, Esq.:

Q. Do you remember that there were two notes made by Johnson & Crawford, endorsed by Quinlan, Montgomery & Co., one for $10,000, the other for $11,185, and that as a part of the consideration of these notes a certificate of deposit was issued by the Mastin bank to G. Baer? After the assignment of the Mastin bank and while the notes were in the hands of Karnes & Ess, as attorneys for the Metropolitan National bank, did you not agree and consent that if the larger note should be paid that the remaining note should be made out of the assets of the mortgaged property by you to the Metropolitan National bank?

A. While I can't give it exact, I remember that there was a loan made by the Mastin bank to these parties for about the amount mentioned—I don't recollect exactly—and also that there was a certificate of deposit issued by the Mastin bank in favor of this man Baer for $10,000. In regard to the latter part of the question I have no definite recollection as to just what was said, but know in a general way that I was not specially interested as to whether they paid the larger or the smaller note or either of them; that as my property was mortgaged to the Metropolitan National bank to secure the payment of a large amount of money, and I expected at that

time that it would all be absorbed, and it was a matter of indifference to me to what notes it was applied at that time.

Q. Can you say whether you agreed or consented to the arrangement mentioned or not?

A. I have no recollection about it in the world.

329 Q. Do you deny that you made any such agreement or consent?

A. There were so many things being done and said about the time in question that I haven't any definite recollection as to what was said and done in regard to this particular matter. I only know in a general way, as before stated, that I expected all of the property would be consumed in paying the indebtedness to the Metropolitan National bank. Referring to a memorandum handed me of the note supposed to be written by Henry N. Ess and dated on the 20th day of May, 1879, in which he states referring to this particular note, I presume, he says: "By agreement and consent of John J. Mastin we are to endeavor and use our best efforts to make the money from a mortgage of certain real estate in Missouri and Kansas now held by the Metropolitan National bank for this and other notes." It is really my impression that I was not here at that time, but I haven't any idea that Mr. Ess would have made this statement unless he had it from me, and I didn't have any objection at that time to have the money made out of that mortgaged property if it could be done, but don't recollect of any promises or agreements in regard to it.

Q. I understood you to say in substance that it made no difference to you which of these two notes was paid. Look at this note (handing to witness) and the endorsements on it, and say if your firm were not endorsers prior to the Mastin bank, and whether your firm was not sued by the Metropolitan National bank along with Johnson & Crawford and others about the time of the payment of the larger note.

A. Looking at the note I find that it is executed by Johnson & Crawford in favor of Quinlan, Montgomery & Co., and endorsed by Quinlan, Montgomery & Co. and John J. Mastin & Co. in blank, and then by the Mastin bank. It is endorsed to the Metro-

330 politan National, which makes Quinlan, Montgomery & Co. and John J. Mastin & Co. prior endorsers to the Mastin bank. I have no recollection in the world about the time when either one of the notes was paid or of when suit was instituted by the Metropolitan National bank against John J. Mastin & Company and others on account of this note.

Q. Do you know how the suit I have just referred to was disposed of, and when?

A. No; I don't of my own knowledge.

Q. Did I understand you that judgment was rendered against you on that note?

A. I don't know whether it was or not for this reason: John J. Mastin & Co. were being sued about that time on various notes by the Metropolitan National bank, to which they didn't make any defence or any appearance that I know of, and they were also being

sued by a great number of the depositors of the Mastin bank, which made so many complications and so many suits that I really don't have any recollection about this particular note.

Q. Do you know that this suit was dismissed upon the payment of the balance that was due on the note by F. L. Underwood under an agreement with the Metropolitan National bank?

A. Not to my own knowledge. I don't know anything about it.

Q. Do you remember whether at any time between 1880 and 1885 the agreement between the Metropolitan National bank and F. L. Underwood was mentioned to you by Karnes & Ess or by Crawford; if so, what you said concerning it?

A. I don't recollect that it was ever mentioned to me.

Q. Did not the firm of John J. Mastin & Co. claim and receive as theirs the twenty per cent dividend paid by Coates, assignee of the Mastin bank, in October, 1884, arising out of the sale of the
331 balance of the assets of the Mastin bank on this note for $10,000 heretofore referred to and the certificate of deposit for $10,000 heretofore referred to?

A. No, sir.

Q. Did you get the benefit of these dividends in any shape?

A. Not to my knowledge.

Q. Did any one, as their representative or agent, get the benefit of these dividends?

A. Not to my knowledge.

Q. Will you please explain this, Mr. Mastin (handing paper to witness). Will you explain, then, how it is that in a statement dated 23rd of February, 1885, signed by John J. Mastin & Co., they agree to allow a credit to Johnson & Crawford of $2,000, being one-third dividend on certificate of $10,000?

A. I can't explain about it. I don't know we did do such a thing.

Redirect examination by T. A. FRANK JONES, Esq.:

Q. You say in your cross-examination that John J. Mastin & Co. were prior endorsers to the Mastin bank on this note. Who discounted the note for Johnson & Crawford in the first place?

A. The Mastin bank.

Q. Did John J. Mastin & Co. get anything either from the Mastin bank or the Metropolitan bank for their endorsement?

A. No; they didn't get anything.

Q. The endorsement of John J. Mastin & Co. on this note was then purely an accommodation endorsement?

A. Yes; purely an accommodation endorsement; and that prior endorsement to the Mastin bank was made simply because it was easier than to fill out the endorsement of the Mastin bank first.

Q. It is a fact that the only difference between the two notes of Johnson & Crawford was that the Mastin bank gave them money for one and a certificate of deposit for the other, and that
332 John J. Mastin & Co. stood in precisely the same relation to both notes?

A. Yes, sir.

JOHN J. MASTIN.

Subscribed and sworn to before me this 20th day of April, A. D. 1886.

[SEAL.] JOHN M. PARRY,
Notary Public, Jackson Co., Mo.

333 Afterwards, to wit, in vacation of said court and on the 28th day of September, A. D. 1888, the following proceedings were had and entered of record:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. In Chancery.

At chambers, before the Honorable John F. Philips, district judge.

FRIDAY, *Sept.* 28*th*, 1888.

THE METROPOLITAN NATIONAL BANK
against
THE BATES CO. NATIONAL BANK *et al.*

In the matter of the cross-bill of Jesse N. Johnson *et al.*

The cross-complainants this day appearing by their solicitor, J. F. Mister, Esq., and praying an appeal from the order and judgment of the court upon their answer and cross-bill and tendering a bond in the sum of five hundred dollars therefor, with sureties—

It is ordered that said bond be approved, and that said appeal be granted as prayed.

(Signed) JNO. F. PHILIPS, *Judge.*

334 Said bond for appeal is in words and figures as follows:

UNITED STATES OF AMERICA, *sct:*

Know all men by these presents that we, Jesse N. Johnson, as principal, and —— ——, as securities, are held and firmly bound unto The Metropolitan National Bank of the City of New York, John J. Mastin, and Thomas H. Mastin, their executors and administrators, in the sum of five hundred dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifth day of September, A. D. 1888.

Upon this express condition, to wit: Whereas the above-named Jesse N. Johnson, together with one Robert F. Crawford, have prosecuted their appeal to the Supreme Court of the United States, Washington, District of Columbia, to reverse the judgment rendered in the cause above named by the circuit court of the United States for the western division of the western district of Missouri:

Now, if the above-named Jesse N. Johnson and Robert F. Crawford aforesaid shall prosecute their said appeal to effect and answer

all damages and costs if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

JESSE N. JOHNSON. [SEAL.]
ALEXANDER W. ACHESON. [SEAL.]
ARTHUR H. COFFIN. [SEAL.]

Signed and sealed in presence of—
WM. A. JOHNSON,
As to J. N. J.
WM. F. SHUTE,
As to J. N. J.
ED. ZINTGRAFF,
As to A. W. A. & A. H. C.
W. G. ACHENBACH,
As to A. W. A. & A. H. C.

335 The above bond is hereby approved and ordered to be filed and made a part of the record.

JNO. F. PHILIPS, *Judge.*

UNITED STATES OF AMERICA, *District of Texas,* } ss:

Alexander W. Acheson, of Dennison, Texas, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein and is worth, over and above all his debts and liabilities, the sum of five thousand dollars, and that he owns property to that amount, subject to execution, in the State of Texas.

ALEXANDER A. ACHESON.

Subscribed and sworn to before me this fourteenth day of September, A. D. 1888.

[SEAL.] ED. ZINTGRAFF,
Notary Public, Grayson County, Texas.

UNITED STATES OF AMERICA, *District of Texas,* } ss:

Arthur H. Coffin, of Dennison, Texas, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein and is worth, over and above all his debts and liabilities, the sum of five thousand dollars, and that he owns property to that amount, subject to execution, in the State of Texas.

ARTHUR H. COFFIN.

Subscribed and sworn to before me this fourteenth day of September, A. D. 1888.

[SEAL.] ED. ZINTGRAFF,
Notary Public, Grayson County, Texas.

336 UNITED STATES OF AMERICA, *District of Columbia,* } ss:

Jesse N. Johnson, obligor in the within bond, being duly sworn,

upon his oath deposes and says that he resides as therein stated and is worth, over and above all his debts and liabilities, the sum of five thousand dollars, and that he owns real estate to that amount, subject to execution, in the State of Texas.

JESSE N. JOHNSON.

Subscribed and sworn to before me this eleventh day of September, A. D. 1888.

[SEAL.] JNO. C. PEDRICK,
Notary Public, D. C.

337 UNITED STATES OF AMERICA, *sct:*

I, Warren Watson, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the foregoing is a true transcript of the record and proceedings in the cause therein named as fully as the same appears in my office.

Witness my hand as clerk and the seal of said court.

Done at office, in the city of Kansas, Missouri, this 9th day of October, A. D. 1888.

{ Seal of the United States Circuit Court for the Western District of Missouri, Western Division. }

WARREN WATSON, *Clerk.*
By —— ——, *D. C.*

[Endorsed:] No. —. United States circuit court, western division of the western district of Missouri. —— ——, plaintiff–, against —— ——, defendant–. Certified copy of the — in the above-entitled cause. Fee, —.

338 In the Supreme Court of the United States, October Term, A. D. 1891.

F. L. UNDERWOOD *et als.*, Appellants,
vs.
THE METROPOLITAN NATIONAL BANK OF NEW YORK *et als.*, Respondents. } No. 270.

Stipulation.

It is stipulated that the following parts of the record in the above-entitled cause need not be printed—that is to say:

I. The original bill of foreclosure, which is entitled Metropolitan National Bank of New York *vs.* Bates County National Bank, John J. Mastin, *et als.*, which was a bill to foreclose a mortgage to the Metropolitan National Bank of New York by John J. Mastin and Thomas H. Mastin to secure said bank upon certain notes rediscounted to said Metropolitan bank by the Mastin bank and indorsed by said The Mastin Bank as well as by John J. Mastin & Co, a firm composed of said John J. Mastin and Thomas H. Mastin.

II. All answers of defendants in said bill and all replica-
339 tions to such answers.

III. All subpœnas and all stipulations in reference to the

foreclosure suit except the one contained in the cross-bill in form of answer filed by F. L. Underwood *et als.*

IV. It is stipulated that the mortgage sought to be foreclosed by the Metropolitan National Bank of New York in said suit is in words and figures following:

339*a* Know all men by these presents that John J. Mastin and Julia Mastin, his wife, and Thomas H. Mastin and Elizabeth Mastin, his wife, of the county of Jackson, State of Missouri, for and in consideration of one dollar paid by the Metropolitan National Bank of the City of New York, in the State of New York, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant and bargain and sell, unto the said Metropolitan National Bank of the City of New York, its assigns and successors forever, the following-described real estate, situate in the county of Jackson and State of Missouri, to wit: Forty (40) feet front on Fourth street by ninety (90) feet deep off the east end of lots 148 & 149, in block 15, old town, and lot 250, in block twenty-six (26), old town, except twenty-four (24) feet off the east end and twenty-four feet off the south side and twenty-four feet (24) by one hundred and forty-two (142) feet off the south side of the north forty-eight (48) feet of lot one hundred and sixty-five (165), in block 17, old town; also fifteen feet off the north side of block sixty-four (64) and all of lot sixty-five (65), in block twelve
339*b* (12), Hubbard's addition, and lots six (6), seven (7), eight (8), nine (9), and ten (10), in block 2, Hubbard's addition; also lots 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, and 543, in block thirty-nine (39), in McGee's addition; also ten acres of land in the city of Kansas, bounded on the north by McGee's addition, on the east by Vineyard's addition, on the south by McGee's place, and on the west by Evans' addition; also five acres of land (5) in the city of Kansas, being the undivided one-sixteenth ($\frac{1}{16}$) part of the north half of the northwest quarter of section eight (8), township forty-nine (49), in range thirty-three (33); also lot- 424, 425, 426, 434, and 435, in block thirty-two (32), in McGee's addition; also the undivided one-half ($\frac{1}{2}$) interest in a block of land in McGee's & Holmes' addition two hundred and forty-seven and one-half feet ($247\frac{1}{2}$) north and south by two hundred and seventy-four (274) — east and west, bounded on the west by Oak street and on the east by Locust street and on the north and south by Fourteenth street; also nine acres of land off the north end of the east half of the northeast
339*c* quarter of section nineteen (19), township forty-nine (49), range thirty-three (33), and two acres off the south end of the east half of the southeast quarter of section eighteen (18), same township and range; also the west half of lots 7 & 8 and the east half of lots three and four and east half of the west half of lot one (1), all of John Harris' subdivision of the northwest quarter of section twenty (20), in township forty-nine (49), range thirty-three (33); also forty-three and seven-tenths ($43\frac{7}{16}$) acres, described as follows: Beginning at the southwest corner

of section seventeen, township forty-nine (49), range thirty-three, running thence thirteen hundred and twenty-four feet; thence north seventeen hundred and forty-four and three-twelfths feet to the center of turnpike; thence southwestwardly with turnpike fourteen hundred and thirty-four —; thence south eleven hundred and fifty-four and six-twelfths feet to place of beginning, excepting from the above description ten acres of land sold for Catholic school and church purposes; also the southeast quarter of the northwest quarter and the southwest — of the northeast quarter of section
339*d* thirty-five (35) and twenty acres off the north end of the west half of the southeast quarter and the north half of the north half of the southwest quarter and the northeast quarter and the southeast quarter of the northwest quarter, all in section thirty-six (36), township forty-eight (48), range thirty-three (33); also sixty-five acres (65) off the west end of the southwest quarter of section thirty-three (33), in township forty-seven (47), range thirty-three (33), and thirty-nine and forty-six one-hundredth- acres off the south end of the south half of fractional section thirty-one (31) and the undivided two-thirds ($\frac{2}{3}$) interest in the east half of the southeast quarter section thirty-two (32) and undivided two-thirds interest ($\frac{2}{3}$) in thirteen $\frac{8}{10}$ acres — the north end of the south fractional half of section thirty-one (31) and twenty acres (20) of- the west end of the north half of the southwest quarter section thirty-two (32) and ten (10) acres off the north end of the southwest quarter of the south half of the southwest quarter of section thirty-two (32), all in township forty-seven (47), range thirty-three (33), all the foregoing real estate situate in the county of Jackson, State of Missouri; also
339*e* upon the following-described real estate, situate in the county of Johnson and State of Kansas, to wit:

The north half of the northwest quarter and the south half of the northeast quarter, both in section thirteen (13), and the west half of the southwest quarter of section twelve (12), all in township twelve (12), range twenty-four (24); also south half of blocks forty-five and forty-seven, block forty-six, south half of block forty-eight, block forty-nine except lots twenty-three and twenty-four, block fifty except lots 1, 2, 3, 4, 5, and 6, blocks 51, 52, 61, 62, 63, and 64, town of Shawnee, Johnson county, Kansas.

Also upon the following-described real estate, situated in the county of Nemaha, State of Kansas, to wit:

The southeast quarter of section three (3), the east half of the northeast quarter and the south half of section twenty-two (22), and the south half of the southwest quarter of section twenty-five (25), all in township two (2), in range eleven (11); also the northeast quarter of the north half of the northwest quarter of section fourteen (14) and the northeast quarter of section fifteen (15) and the southwest quarter of section twenty-one (21) and the southwest quarter and the southeast quarter of the northwest quarter of section
339*f* twenty-eight (28) and the northeast quarter of section thirty-three (33) and the southeast quarter of section thirty-four 34), all in township three (3), range eleven 11; also the northwest quarter and north half of southwest quarter of section twenty-nine

(29) and the east half of the northwest quarter section thirty-one (31), all in township five (5), range eleven (11); also the northeast quarter of section five (5) and the southeast quarter of section six (6), both in township two (2), range twelve (12); also the northwest quarter of the north half of the southwest quarter of section eighteen (18) and the southwest quarter of section nineteen (19), all in township three (3), range twelve (12); also the southern one hundred and forty acres of southwest quarter of section twenty (20) and the northwest quarter of section twenty-two (22) and the northeast quarter of section twenty-nine (29), all in township three, range twelve; also the northeast quarter of section thirty-one (31), township four (4), and the east half of the northwest quarter of section fourteen, the east half of southeast and the east half of northwest quarter section fifteen (15) and the east half of the southeast quarter of section twenty (20) and the north half of section thirty-three
339g (33), all in township five, range twelve (12); also the north half of section thirty-five, township one (1), and southeast quarter of section four (4) and the east half of the southeast quarter of section thirty-five (35), township five (5), all in range thirteen (13); also the southeast quarter of section five and the east half of northwest quarter of section six (6), both in township four (4), and the northeast quarter section nineteen (19), in township five (5), all in range fourteen (14); also the northeast quarter section thirty-three (33), in township three (3), southeast quarter section two (2), the northwest quarter section four (4), both in township two (2) and all in range twelve; also the south one-half of southwest quarter section eighteen (18) and the northwest quarter section nineteen (19), both in township three and range thirteen (13); also the southwest quarter section five, township two (2), range eleven (11); also the east one-half and northeast quarter of section six (6), in township two (2), range ten (10); also the northwest quarter section twenty-three (23) and the southwest quarter section twenty-eight and the southeast quarter and the east one-half of northeast quarter and west one-half of northwest quarter, in section twenty-nine (29), all
339h in township five (5), range twelve (12); also the southwest quarter of section eight (8) and the southeast quarter of section ten (10), both in township five (5), range thirteen (13); also the northwest quarter of section six (6), township three, range fourteen (14), containing in all seven thousand three hundred acres, more or less:

To have and to hold the said described real estate, with all the rights, privileges, and appurtenances thereto belonging, unto the said Metropolitan National Bank of New York, its assigns and successors forever, and upon this express condition: Whereas the Mastin Bank of Kansas City, Missouri, is indebted to the said Metropolitan National bank as endorser on various notes, drafts, and bills which the said Mastin bank has sold to said Metropolitan National bank: Now, therefore, if the said Mastin bank, its assigns or successors, shall pay or cause to be paid all notes, drafts, and bills so sold to the said Metropolitan National bank and shall pay or cause to be paid all notes, drafts, and bills which the said bank may here-

after sell and endorse to the said Metropolitan National bank, then this conveyance shall be void; otherwise in full force and virtue at law.

In witness whereof we have hereunto set our hands and affixed our seals this seventh day of June, 1878.

339*i* JOHN J. MASTIN.
THOS. H. MASTIN.
ELIZABETH S. MASTIN.
JULIA MASTIN.

STATE OF MISSOURI:

Be it remembered that on this seventh day of June, A. D. eighteen hundred and seventy-eight, before me, the undersigned, a notary public in and for the county and State aforesaid, came John J. Mastin and Julia Mastin, his wife, and Thomas H. Mastin and Elizabeth S. Mastin, his wife, who are the persons known to me to be the identical persons who executed the foregoing instrument, and acknowledged that they executed and delivered the sa*l*e as their voluntary deed and for the uses and purposes therein mentioned; and the said Julia Mastin and Elizabeth S. Mastin being by me made acquainted with the contents of said deed, acknowledged on examination apart from their husbands that they executed the same and relinquished their dower to the real estate therein mentioned freely and without compulsion or undue influence of their said husbands.

I further certify that my commission as notary public will expire on February 27th, 1883.

Given under my hand and notarial seal this 7th day of
339*j* June, A. D. 1878.

J. H. LIPSCOMB,
Notary Public.

Filed for record and duly recorded in my office on this 7th day of January, 1879, at 2 o'clock p. m.

CHAS. D. LUCAS, *Recorder.*

The within is admitted to be a correct copy of the mortgage from John J. Mastin *et al.* to the Metropolitan National bank, dated June 7th, 1878, and recorded in the office of the recorder of deeds of Jackson county, Missouri, in Book B 36, at page 23.

JAS. F. MISTER,
Solicitor for Crawford et al.

V. It is agreed that this stipulation shall be printed and considered by the court in the argument of the case.

WALLACE PRATT,
JAS. F. MISTER,
Attorneys for Appellants.
CHARLES O. TICHENOR,
Attorney of Respondents.

Kansas City, Mo., November 16, 1891.

340 [Endorsed:] 13389. Supreme Court U. S., Oct'r term, 1891. No. 270. F. L. Underwood *et al.*, app'ts, *vs.* The Metropolitan National Bank of the City of New York *et al.* Stipulation as to omitting parts of record in printing.

[Stamped:] Office Supreme Court U. S. Filed Nov. 19, 1891. James H. McKenney, clerk.

341 SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

F. L. UNDERWOOD *et al.*, Appellants, *vs.* THE METROPOLITAN NAT'L BANK, &c., *et al.* } No. 270.

INDEX.

Citation	Out	*a*
Proof of service of citation	Out	*b*
Order filing bill and granting subpœna	Out	1
Bill of complaint	Out	1
Subpœna	Out	116
Marshal's return	Out	117
Subpœna	Out	118
Marshal's return	Out	119
Appearance of Kersey Coates, assignee, &c.	Out	119
Henry Kahn	Out	120
Johnson County savings bank	Out	120
John Murray	Out	121
Elijah Gates	Out	121
A., T. & S. F. R. R. Co.	Out	121
Bates County National bank *et al.*	Out	122
George W. Jones *et al.*	Out	122
Order filing answer of A., T. & S. F. R. R. Co.	Out	123
Answer of A., T. & S. F. R. R. Co.	Out	123
Appearance of Nathan E. Harrelson *et al.*	Out	123
Exchange Bank of Breckenridge, Mo., *et al.*	Out	124
Answer of Elijah Gates *et al.*	Out	125
342 Order filing answers and reply	Out	128
Reply to answer of Gates *et al.*	Out	128
Answer of Adam and John Long	Out	129
James A. Bryant	Out	132
Order filing answer of Dickinson *et al.*	Out	135
Answer of M. H. Dickinson *et al.*	Out	135
Order filing disclaimer of Bigelow & Shaw	Out	138
Disclaimer of Bigelow & Shaw	Out	138
Order filing answer of Kahn	Out	139
Answer of Henry Kahn	Out	139
Deed, Mastin *et ux.* to Kahn, September 7, 1878	Out	143
Order as to time to take testimony, &c.	Out	145
Stipulation as to time to take testimony, &c.	Out	145
Order filing reply	Out	147
Reply to answers of Dickinson *et al.*	Out	147
Order of dismissal as to defendant Cahn	Out	148
Withdrawal of appearance for Kersey Coates	Out	148
Stipulation substituting attorneys for complainant	Out	149
Order filing answer of J. J. and T. H. Mastin, &c.	Out	149
Answer of J. J. Mastin and Thomas H. Mastin	Out	150
Exhibit A—Statement of notes held by the Metropolitan National bank and returned to Coates, assignee, on April 17, 1879, without consideration	Out	181
343 B—Agreement between John J. Mastin & Co. and the Metropolitan National bank, October 8, 1878, &c.	Out	181
Stipulation as to filing pleadings, &c.	Out	183

Order filing cross-bill, &c. 184
Cross-bill 184
Exhibit A—Statement of notes held by the Metropolitan National bank and returned to Coates, assignee, on April 17, 1879, without consideration 208
B—Agreement between John J. Mastin & Co. and the Metropolitan National bank, October 8, 1888, &c. 209
Order filing supplemental bill and replications 210
Supplemental bill 211
Replication to answer of J. J. and T. H. Mastin 212
Replication to answer of J. J. and T. H. Mastin 213
Order filing answer and demurrer to cross-bill 214
Answer to cross-bill 214
Demurrer to cross-bill 219
Order filing replication to answer to cross-bill 220
Replication to answer to cross-bill 221
Order filing answer of Underwood *et al.* 222
Answer of F. L. Underwood *et al.* 222
344 Stipulation as to evidence, &c. 232
Order taking cause under advisement 235
Answer of John J. and Thomas H. Mastin 235
Exhibit A—Quitclaim deed from the Metropolitan National bank to John J. and Thomas H. Mastin, May 18, 1886 242
B—Deed of mortgage from John J. Mastin *et ux.* and Thomas H. Mastin *et ux.* to the Metropolitan National bank, June 7, 1878 246
Replication to answer of John J. Mastin and Thomas H. Mastin 252
Opinion 253
Decree of April 2, 1887 257
Decree of May 18, 1888 257
Evidence 259
Testimony of J. V. C. Karnes 259
Further statement 281
Record in Metropolitan National Bank *vs.* Johnson *et al.* 283
Complaint 283
Answer of Quinlan *et al.* 285
Judgment of dismissal 288
Testimony of R. F. Crawford 289
C. C. Quinlan 298
345 Exhibit A—Protest of note of Johnson & Crawford of July 18, 1878, &c. 301
B—Protest of certificate of deposit of Mastin bank of July 18, 1878, &c. 305
Testimony of F. L. Underwood 310
Exhibit A—Statement of F. L. Underwood, October 22, 1880 312
Agreement between Metropolitan National bank and F. L. Underwood, October 20 313
Testimony of Thomas H. Mastin 316
John J. Mastin 326
Order allowing appeal 333
Appeal bond 334
Clerk's certificate 337

The clerk of the Supreme Court United States:

In printing record in this cause leave out all that part referred to in index above marked "out," but insert, as provided for by stipulation on file, the mortgage sought to be foreclosed.

CHARLES O. TICHENOR,
For Respondents.

JAS. F. MISTER,
WALLACE PRATT,
For Appellants.

December 2, 1891.

346 [Endorsed:] Supreme Court U. S. 1891, October term. No. 270. F. L. Underwood *et al.*, app'ts, *v.* The Metropolitan National Bank of City of N. Y. *et al.* Stipulation specifying parts of record to be omitted in printing. Office Supreme Court U. S. Filed Dec. 5th, 1891. James H. McKenney, clerk.

Endorsed on cover: Case No. 13,389. W. Missouri C. C. U. S. No. 270. F. L. Underwood, Jesse N. Johnson, administrator of A. H. Johnson, deceased, and R. F. Crawford, appellants, *vs.* The Metropolitan National Bank of the City of New York, John J. Mastin, & Thomas H. Mastin. Filed October 19, 1888.

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JAMES H. McKENNEY
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Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

TERM No. 270.

F. L. UNDERWOOD, JESSE N. JOHNSON, *Administrator of A. H. Johnson, deceased*, AND R. F. CRAWFORD,

Appellants,

v.

THE METROPOLITAN NATIONAL BANK OF THE CITY OF NEW YORK, JOHN J. MASTIN AND THOMAS H. MASTIN. *Appellees*.

BRIEF.

JAS. F. MISTER,
For Appellants.

THE PRINTERY, ARMOUR BUILDING, KANSAS CITY, MO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

F. L. UNDERWOOD, et al.,
Appellants,
v.
THE METROPOLITAN NATIONAL BANK OF NEW YORK, JOHN J. MASTIN, et al.,
Respondents.
Docket No. 270.

STATEMENT OF CASE.

I

1. This is a proceeding in the nature of a Cross Bill, interposed by the appellants during the pendency of an orignal bill of foreclosure, which is entitled Metropolitan National Bank of New York, vs. Bates County National Bank, John J. Mastin, et. al., in the Circuit Court of the United States for the Western Division of the Western District of Missouri, which was a bill to foreclose a mortgage to said Metropolitan National Bank by John J. Mastin and Thomas H. Mastin, to secure said bank upon certain notes rediscounted to said Metropoli-

tan National Bank by The Mastin Bank, and indorsed by said The Mastin Bank, as well as by John J. Mastin & Co., a firm composed of John J. Mastin and Thomas H. Mastin.

The intervention of appellants by Cross Bill, was in pursuance of an agreement made by them with the said Metropolitan National Bank *to which the said Mastins were actual parties*, (though not formally signing the agreement,) by which, in consideration of the payments by appellants to said Metropolitan Bank of a part of the debt secured by said mortgage, it was agreed that appellants should share with said Metropolitan Bank *pro rata* in the security furnished by the lands described in said mortgage lying in the State of Missouri; and it was further agreed that said Metropolitan National Bank would file a supplemental bill setting up the agreement so that appellants might "obtain such orders as they may deem necessary and proper to obtain a *pro rata* division of the proceeds arising from the decree of foreclosure."

The bill of foreclosure by the Metropolitan National Bank against the Mastins, *was filed in 1879*, but no Supplemental Bill was filed until *February, 1886*, because it was expected that settlement would be made between the parties without actual foreclosure; but at that time, (February, 1886,) a Cross Bill was filed by the Mastins *denying any liability* under the mortgage, and *about the same time* the supplemental bill was filed, (as had been agreed,) after which appellants filed answer in the nature of a Cross Bill aforesaid, setting up, among other things, the agreement aforesaid, made by them with the said Metropolitan National Bank and the said

Mastins, and claiming their rights under said agreement. The Metropolitan National Bank took issue with the Mastins upon the matters contained in their Cross Bill; but subsequently, on the 18 May, A. D. 1886, the said Metropolitan National Bank, executed to the Mastins a deed of Quit Claim, releasing to them, (the Mastins,) *as to the claim of said Bank*, all the property described in said mortgage. The Mastins also took issue with appellants upon the matter contained in *their* Cross Bill, and upon final hearing the bill was dismissed for want of equity; from which decree an appeal was taken to this Court.

By stipulation, all matters not affecting the present and pending controversy, are to be omitted from the transcript, (though, as will be seen, a few of them by inadvertence have not been so excluded,) so as to disencumber the record of matter not controverted.

2. The claim set up by the Cross Bill of appellants is based upon *the facts* following:

(1.) *On the 18th of July, 1878*, Johnson and Crawford—(appellants here with Underwood)—bought cattle from one G. Baer, of Texas, to the amount of 25 or 28,000 dollars, and applied to The Mastin Bank for a loan of 20,000 dollars. That bank required them to find indorsers, which was done, (Quinlan, Montgomery & Co. endorsing for them,) and the loan was made, for which the notes of Johnson & Crawford, indorsed as aforesaid, were given,—one at 30 days for 10,000 dollars, and one at 60 days for 11,185 dollars.

(2.) *At the same time* of the transaction between Johnson & Crawford with Baer and, with

said The Mastin Bank, there was a further transaction between *Baer and said bank* by which a certificate of deposit was issued to him by said bank, payable in New York exchange 30 days after date for 10,000 dollars. But the next day Baer became uneasy about his certificate of deposit and wanted further security, and so in order to satisfy him (B.) both Johnson & Crawford and Quinlan, Montgomery & Co. indorsed the certificate of deposit. [It may be added here that before the maturity of this certificate of deposit, the said The Mastin Bank, made an assignment, and payment of it (the certificate of deposit) was refused by the assignee of said bank, but Johnson & Crawford and Quinlan, Montgomery & Co. paid the whole of it to the holder.]

(3.) The notes hereinbefore mentioned were indorsed also by John J. Mastin & Co., and by The Mastin Bank, and by the latter rediscounted with the Metropolitan National Bank of New York. About this time, John J. Mastin and Thomas H. Mastin executed and delivered to said Metropolitan National Bank a mortgage on lands in Missouri and Kansas, to secure *these notes*, and other indebtedness, which mortgage was duly recorded subsequently to the assignment of The Mastin Bank.

3. *At the October term, 1880*, of the Circuit Court of the United States, for the Western Division of the Western District of Missouri, (the bill for foreclosure being then pending there,) the said Metropolitan National Bank brought suit on the note for 10,000 dollars, referred to heretofore, against *all the parties to said note*, (including the Mastins,) *except* The Mastin Bank, alleging the fixing of liability upon the indorsers severally,

Among the averments of the answer of Johnson & Crawford, (appellants here with Underwood,) denying liability, it was alleged: "That on the 20th day of May, 1879, the plaintiff (Met. Bk.) in consideration that defendants, (Johnson & Crawford,) would, and did pay on the note sued on, the sum of 1271.84 dollars, (being the first dividend on said note from The Mastin Bank,) and would, and then did pay to plaintiff in full a certain other note, (i. e. the one for 11,185 dollars referred to heretofore,) and in consideration that defendants disputed and denied their liability on the note sued on, the said plaintiff did agree to and with defendants, to use its best efforts to make the money out of said mortgage, but that plaintiff keeps and retains the money by it received, and does not make any effort to collect said debt out of said mortgage, but refuses to do so." The issues raised by the answer did not come to trial, (but the truth of these averments fully appears by the evidence in this record;) but on the 20 October, 1880, the said Metropolitan National Bank, (at the instance and with the sanction of the Mastins, although they are not formally parties to it,) made an agreement with one F. L. Underwood, (who acted in behalf of Johnson & Crawford, et. al., as follows:

"This agreement made and entered into this 20th day of October, 1880, by and between The Metropolitan National Bank of New York, party of the first part, and F. L. Underwood, party of the second part, witnesseth: *First.* That said party of the first part, as endorsee from The Mastin Bank of Kansas City, Missouri, is the owner and holder of a certain promissory note executed by Johnson

& Crawford to Quinlan, Montgomery & Company, and by said Quinlan, Montgomery & Company endorsed, and upon which said note there is a balance due of principal and interest at this date, of 7,603.51 (dollars), *and for which suit is now pending in the Circuit Court of the United States at Kansas City. Second.* On said note one John J. Mastin and Thomas H. Mastin are also endorsers, and to secure the payment of the same, with other liabilities, said Mastins executed to said party of the first part, a mortgage on certain real estate in Missouri and Kansas, and to foreclose said mortgage suits are now pending, one in the Circuit Court of the United States at Kansas City, and one in the same Court at Topeka, Kansas. *Third.* For and in consideration of the sum of 7,603.51 (dollars), paid to said party of the first part by said party of the second part, *and the payment of all costs in said suit thereon*, said note so executed by said Johnson & Crawford, has this day been assigned and transferred, without recourse, to said party of the second part. *Fourth.* It is also further agreed, *as a part of said assignment and transfer*, that the said party of the second part shall release, and hereby releases, all claim or interest in so much of said mortgage as covers the real estate therein described and lying in the *State of Kansas*, but as to the land lying in the State of *Missouri* and covered by said mortgage, the said party of the second part shall retain his interest therein, in consideration of the release of the Kansas lands as aforesaid; and *the said party of the first part stipulates and agrees that in said foreclosure proceedings, it will file a Supplemental Bill showing this assignment of said note*, and to which said

party of the second part agrees to enter his appearance, and make proper answer or plea thereto, *so that the same may be determined as a part of said foreclosure; and so that said party of the second part may obtain such orders as he may deem necessary and proper* TO OBTAIN A *pro rata* DIVISION OF THE PROCEEDS ARISING FROM THE DECREE OF FORECLOSURE. *Fifth.* In all matters pertaining to said mortgage, *whether by foreclosure or otherwise*, it is agreed by and between the parties hereto, that the same shall be managed exclusively by said party of the first part, without any interference or hindrance by said party of the second part. *Provided*, however, *that nothing shall be done to impair or affect the right of the said party of the second part to receive his* PRO RATA *share of whatever sum may be realized from foreclosure*, OR OTHERWISE, *from the Missouri lands. Sixth.* It is also further agreed by and between the parties hereto, that except as to the Kansas lands so released as hereinbefore recited, said party of the second part *shall be entitled to receive on said note a* PRO RATA *share of any other security* held by said party of the first part, for this and other indebtedness of said John J. Mastin and Thomas H. Mastin.

Executed in duplicate, the day and year aforesaid.

THE METROPOLITAN NATIONAL BANK of New York,
By Karnes & Ess, Attorneys.
F. L. UNDERWOOD."

This agreement was made *at the instance* and by the direction of the Mastins, and with the consent of all the parties to the trade, (makers, indorsers

and holder,) and is in substantial *performance* of the violated agreement previously made, which is set up in the answer to the petition of the Metropolitan National Bank of New York, in its suit on this note referred to in this agreement, and upon the execution and delivery of this agreement between the said Metropolitan Bank and Underwood, the money stipulated therein (7,603 51-100 dollars) was *paid* to said bank, and the note [referred to therein was delivered to Underwood, and the suit upon it in the circuit court of the United States, to which the Mastins were parties defendant, and *making no defense*, (page 52) was *dismissed*.

On the *22d October, 1880*, Underwood executed a writing to the effect, that "the claim" (this note) "was bought with the money of Johnson and Quinlan; and they were entitled to the claim and all dividends made upon it, and that this, (the writing,) should operate as an assignment to them of said claim." Subsequently, as appears from the evidence in this record by Quinlan the matters between Johnson and Crawford and Quinlan, Montgomery and Company were paid and settled. So that Johnson and Crawford are entitled to all the benefits of the agreement made by the said Metropolitan National Bank of New York with Underwood, (pages 65, 32).

At the time of this agreement so made with the Metropolitan Bank by Underwood aforesaid, there had been payments made upon said *notes* as follows:

March or April 26, 1879, by Coates, assignee	$1,238.12
Jan'y 8, 1880, by same	452.29

Also from dividends on the *certificate of deposit*, as follows:

May 21, 1879, by Johnson and Crawford,	1,271.38.
May 17, 1880, by same.....	529.94.

These payments (after charges for interest on the note amounting to about 1,200 dollars,) left a balance due, (including an item of 37 13-100 dollars for court costs,) of *7,640 63-100 dollars*, which is the amount named in the agreement with said Metropolitan Bank—that is to say 7,603 50-100 paid the bank and 37 13-100 for costs aforesaid. Total, *7,640 63-100 dollars*. So that the Metropolitan Bank *received* by this payment, including previous receipts from dividends, the whole of the note for 10,317 72-100 dollars, held by it, the consideration for which was the certificate of deposit hereinbefore mentioned.

4. *Since the making* of the agreement aforesaid between the Metropolitan Bank and Underwood, there has been a *further* payment of dividends by the assignee of The Mastin Bank of 20 per cent, which would amount in the case of the certificate of deposit to 2,000 dollars. This dividend came from the sale of the remaining assets of The Mastin Bank, (after the Mastins had bought up all the claims against it at their own figures,) for 275,000 dollars, nominally to Karnes, the attorney of the Mastins, but actually as Karnes himself says, (in his deposition appearing in this record,) to the Mastins, or for their benefit. Under the agreement with Underwood by the Metropolitan Bank this dividend belonged to Underwood, (for the benefit of Johnson and Crawford,) unless the

amount paid by him to it should be repaid out of the mortgaged property, according to the agreement. But Karnes, treating this agreement as effectual,—having made it by their direction and recognized it as binding for *five years*,—accounted for this dividend to the Mastins, and they (the Mastins,) *holding to the dividends* repudiate the agreement. And *these dividends* are on the certificate of deposit paid *in full* to the holder by Johnson & Crawford; and *paid again* to the Metropolitan National Bank *upon the chance* of reimbursement out of the mortgaged property, *as standing in the place of said bank in said mortgage*, to the extent of such payment.

So far as regards the 10,000 dollar note, (the only consideration of which was the certificate of deposit,) *no part of it was paid out of the mortgaged property pledged by the Mastins*, and the Metropolitan Bank was paid for it out of dividends received from The Mastin Bank assets, and by the money received from Underwood acting in behalf of Johnson & Crawford; so that bank (The Metropolitan National Bank,) might well agree, *even without the sanction of the Mastins*, that those who paid it should stand in its place with reference to the security held by it. And so far as the Mastins are concerned *they* have never paid this debt *due by them* to said Metropolitan Bank, for which this mortgaged property was pledged as security. Except for the payment of it by others, their property pledged by the mortgage is still liable for its payment, *as between them and said Metropolitan National Bank*, and the assignee of its rights stands in its place. *Embraced* in the Underwood agreement they had the benefit of

1800 dollars of dividends belonging to Johnson & Crawford on the certificate of deposit, (who had paid it to the holder and stood in his place as the creditor of The Mastin Bank,) and of 2,000 dollars further dividend belonging to them, *subsequent* to the agreement; so that they have received the benefit of payments to the Metropolitan National Bank, —*in their behalf* of 7,603.51 dollars directly; and of 3,800 dollars in dividends *belonging to others*.

So far as regards this note of 10,000 dollars, as *between them* (The Mastins) and *Johnson & Crawford* their position is this: They were the indorsers and the sureties of The Mastin Bank, and practically the Bank itself. The consideration of this note was the Certificate of Deposit of The Mastin Bank, which consideration failed and Johnson & Crawford received nothing from it, but paid it to the holder of it. The dividends received upon it were paid over to the Metropolitan National Bank in reduction of the note *given for this Certificate of Deposit*, on the pledge, by the Mastins, to Johnson & Crawford, that the "balance should be made out of the mortgaged property." When the Metropolitan Bank refused to wait longer upon the note, and sued *all the parties to it*, including the Mastins, *who had no possible defense as against the Metropolitan Bank*, they (the Mastins) agreed that if Johnson & Crawford would *pay the balance* due upon the note, after deducting the dividends already received by The Metropolitan National Bank from The Mastin Bank, that they (Johnson & Crawford) should receive their share out of the proceeds of the sale of the mortgaged property *pro rata* with the Metropolitan National Bank. The payment was made

as agreed upon, *and the suit was dismissed.* For five years this agreement was recognized and treated as in force, and *subsequent dividends on Certificate of Deposit* were paid to and received by the Mastins to the amount of 2,000 dollars, when they (the Mastins) denied that they were parties to the Underwood agreement or that they were affected by it; and even if they were that it was void *for want of consideration.* At *this point* the Metropolitan National Bank filed its Supplemental Bill in pursuance of the Underwood agreement, and appellants filed their answer in the nature of a Cross Bill appearing in this record.

5. The defense made by the Mastins is that Johnson & Crawford have only *paid their own debt,* and that if they, (the Mastins,) agreed that the payment should be reimbursed out of the mortgaged property, it was an agreement which was *void* because *without consideration.*

There was at least *some* consideration in the *payment* of 1,800 dollars of dividends to a *third party at their* (the Mastins) *request,* and for their benefit, and in the *taking and holding* of 2,000 dollars more of dividends, *both on the basis of the agreement,* and in the *dismissal of a suit* against them *to which they had no available defense,* (page 52,) and in the loss and *inconvenience* submitted to, with the *benefit* accruing to the promisors, both as to the suit, and the release *as to the Metropolitan National Bank* of the mortgaged property upon which suit of foreclosure was then pending. But the agreement is *neither void,* nor *without consideration* upon other grounds as follows:

The *Mastins were for all practical purposes The*

Mastin Bank. They were stockholders in the bank for a very large amount, and were its principal and managing officers. As such officers they issued the certificate of deposit, when the bank *was in failing circumstances* and *after they had given the mortgage to the Metropolitan National Bank* to secure the indebtedness of The Mastin Bank, and that bank received the money for the note whose only consideration was the certificate of deposit. Within two weeks from the issue of the certificate of deposit (July 18, 1878.—August 3, 1878.) The Mastin Bank failed and made an assignment, and John J. Mastin was indicted for receiving deposits after knowing of insolvent condition of the bank—but was acquitted of this charge, (page 53). *Under these circumstances* Johnson & Crawford denied their liability on the note of 10,000 dollars whose sole consideration was the certificate of deposit, which they themselves took up and paid. They (Johnson & Crawford) were willing that the dividends—even those on the certificate of deposit which they held and owned as creditors of The Mastin Bank,—should go toward the payment of the 10,000 dollar note, but asked that the balance should be paid out of the property mortgaged by the Mastins to the Metropolitan Bank *to secure the indebtedness of The Mastin Bank to it;* and from *the very first the Mastins agreed to this and acted upon it*. When the Metropolitan Bank sued upon this note, this agreement was pleaded by Johnson & Crawford, and the Mastins, who were also defendants in the suit, made no defense, *as they had none as against the Metropolitan Bank*, (page 54). While this suit was pending, and in

settlement of it, the agreement with Underwood, set up in the Cross Bill, was made, at the instance, by the direction and with the sanction of the Mastins—was prepared by their attorneys, Karnes & Ess,—the money paid over to the Metropolitan Bank (completing with the dividends the payment of the 10,000 dollar note held by the Metropolitan Bank,)—the suit dismissed and the costs paid. This agreement was treated as subsisting for 5 years by the Mastins and their attorneys, and they received the benefits of subsequent dividends which would otherwise have gone to the holder of the 10,000 dollar note and of the certificate of deposit. They got the benefit of a payment of 20,000 dollars, for which they had mortgaged property as security,—and dividends on the certificate of deposit belonging to others amounting to 3,800 dollars on the basis and *in part consideration* of this Underwood agreement.

Besides all this, they (the Mastins) were interested in having the debts of The Mastin Bank liquidated, and Johnson and Crawford disputed, *as they well might*, their liability on this note, at least as a debt to The Mastin Bank, when the consideration for the note, (the certificate of deposit,) had wholly failed, and because of the circumstances under which it was issued. They (the Mastins) were under absolute liability to the Metropolitan Bank for the payment of this note, and their property was pledged to secure it, and if they had paid it, it is by no means certain that they could have recovered back the money so paid from Johnson & Crawford in view of their connection with the Certificate of Deposit issued by The Mastin Bank, at the time and

under the circumstances of its issuance. They were sued on the note with Johnson & Crawford and had no possible defense (page 152) and suits for foreclosure of the mortgage were also pending both in this state and in Kansas; and they were liable and likely *and expected* to lose all the mortgaged property; and so they might well be willing to do what they could to meet the requirements of the Metropolitan Bank, their creditor, who was then pressing for payment; and so they might well be willing to make the agreement with Underwood, which they did. It seems incredible that any one could *come into equity*, and look into the face of this Court, with such a plea as this under the circumstances just set forth.

6. It appears very clearly from the evidence in this record, that the Mastins got the benefit of and *actually received* about the amount agreed to be reimbursed by the stipulation made by the Metropolitan National Bank, with Underwood as the representative of Johnson & Crawford; so that they lose nothing in being held to fulfill the contract, to which they are as certainly parties as is the Metropolitan National Bank, as thus:

I. From dividends on the 10,000 dollar note, for which they received credit on their indebtedness to the Metropolitan Bank.

On 12 per cent. dividend.....	$1238.12
On 5 per cent. dividend.....	452.29

II. From dividends on certificate of deposit *which belonged to Johnson & Crawford.*

On 12 per cent. dividend	1271.84
On 5 per cent. dividend	529.94
III. From dividends arising out of sale of assets of The Mastin Bank for 275,000 dollars. (1) On the 10,000 dollar note. Final dividend of 20 per cent	2000.00
(2) On the certificate of deposit. Final dividend of 20 per cent.....	2000.00
Total	87,492.19

But independently of this they have received the benefit of this payment made to the Metropolitan Bank, upon their debt to it, and for their benefit, and if, as they say, they did not bind themselves, or were not bound by the Underwood agreement with the Metropolitan National Bank, the law will *charge the mortgaged property with this payment*, in whosesover hands it may be, and a settlement between the mortgagors and mortgagee, pending this litigation, will not in the least affect the rights or remedies of these appellants, Johnson & Crawford.

This amount so paid is, as has been seen, $7,640.63. But it appears that in this payment, a dividend of $1,341.30 on the note for 11,185 dollars was inadvertently allowed to Johnsen & Crawford as a credit, although the payment was right as to the Metropolitan Bank who received both the dividends and the payment, for they (J. & C.) owed the whole of *that note* ($11,185.00) to The Mastin Bank, and the Mastins are the purchasers of its assets and

therefore entitled to it..... 1,341.30
deducting which there is a

Total..... .....$6,299.33.

To which add interest from *Oct. 20, 1880, to March 20, 1892*—which is 12 years, *at 7 per cent., ($440.95 per year) $5291.40 due to Johnson & Crawford $11,590.73* after deducting the payment of dividend (of $1,341.30) which Johnson & Crawford had the benefit of on the uncontested note.

7. The fact that the mortgagee (Metropolitan Bank) and the mortgagors (the Mastins) have adjusted their differences, and that a release has been filed, pending this litigation as to all the mortgaged property, has no effect whatever upon the rights or remedies of Johnson & Crawford *under the agreement with Underwood*, or independently of it; as this Court will hold *all the mortgaged property* chargeable *with this payment*, both as to the Metropolitan Bank and as to the Mastins, until there is a release by these appellants, after payment to them out of the mortgaged property, or otherwise.

8. Since this appeal was taken John J. Mastin has departed this life, but appearance has been entered in this Court, on his behalf, by his widow, who is also executrix of his estate.

9. The *Supplemental Bill* referred to in this statement, and also in the agreement of Underwood with the Metropolitan National Bank, will be found on *page 17* of the printed transcript of the record, and on *page 211* of the transcript on file in the office of the Clerk of this Court.

The answer of appellants, in the nature of a Cross Bill is, at *page 23* of printed transcript and *page 222*

of original, and contains, with other things, the Underwood agreement set forth in *haec verbis*. There is an important stipulation as to records and papers to be used in evidence, and as to the death of Augustus H. Johnson (of Johnson & Crawford,) and of the incorporation and assignment of The Mastin Bank at *page 30* of printed record and *page 233* of original. The mortgage of the Mastins to the Metropolitan National Bank is made a part of stipulation at *page 89* of printed record, and *page 339* of original, which stipulation also contains an agreement as to the parts of the record to be printed. The testimony produced at the hearing by appellants and read in evidence, is contained in the printed record at pages 44 to 85 inclusive and pages *258 to 332* of the original; this evidence includes that of J. V. C. Karnes, attorney for the Mastins, from the time of the assignment of The Mastin Bank to the sale of the remaining assets to him for their (the Mastins) benefit. The pleadings in the suit upon the 10,000 dollar note, which was settled and dismissed under the Underwood agreement; the evidence of Crawford (of Johnson & Crawford,) of C. C. Quinlan, (of Quinlan, Montgomery & Co.;) the exhibits of the note for 10,000 dollars, and of the certificate of deposit, with their indorsements respectively; the evidence of Underwood, the party to the agreement with the Metropolitan National Bank; with the exhibit in the nature of a declaration of trust showing that he acted for Johnson & Quinlan in the matter, for the benefit of Johnson & Crawford; Quinlan's evidence showing that *he* had been settled with and paid by Johnson & Crawford; and the evidence of Thomas

H. Mastin and John J. Mastin; all of this evidence being in substantial support of the averments of the answer of the appellants in the nature of a Cross Bill. The sole question is whether these facts present a case for equitable relief, or one without merits which must be dismissed.

SPECIFICATION OF THE ERRORS RELIED UPON.

The decree of the Circuit Court of the United States for the Western Division of the Western District of Missouri is erroneous, in the respects following. That is to say:

1. In dismissing the bill of the Metropolitan National Bank v. John J. Mastin, et al., which was a bill for a foreclosure of a mortgage, notwithstanding the release pleaded, which was, subsequently to the filing of the Supplemental Bill by said Metropolitan National Bank of New York and the answer to it by the appellants in the nature of a Cross Bill.

2. In dismissing the Cross Bill filed by the appellants, upon the ground that the mortgage was limited to securing discounts to the Metropolitan Bank, and could not be assigned for other purposes effectually even by the consent of the Mastins.

BRIEF OF THE ARGUMENT.

I.—JURISDICTION.

1. The Cross Bill (pages 24–30) contains mat-

ters necessary to a complete determination of a matter already in litigation, and is the only available means of presenting the rights of the appellants under the Underwood agreement, pending the suit by the Metropolitan National Bank of New York for the foreclosure of the mortgage against the Mastins. It is *based* upon the claim that a decree on the plaintiff's bill will not determine the litigation, and is of the most ancient means of exercising equity powers in order to do complete justice.

Adams' Equity, Ch. 19, Margl. p. 402.
Story's Eq. Pleadings, Sec. 399.

2. There can be no question of citizenship (page 32) considered here, as between appellants and the Mastins. The foreclosure proceedings by the Metropolitan Bank were properly instituted, and have never been questioned, nor are they subject to question; and this suit is *still pending* for all the purposes of this intervention by Cross Bill,—as though no adjustment had been had between the Metropolitan Bank and the Mastins.

II.—SUBROGATION.

1. The appellants here stand in the relation of sureties for The Mastin Bank as indorsers upon its certificate of deposit issued to Baer, (pages 62, 67-71). By paying to the Metropolitan Bank the note, when the sole consideration was the certificate of deposit, (pages 45-47,) they were entitled to "a cession of the

debt, and a subrogation or substitution to all the rights and actions of the creditor against the debtor (i. e. the Metropolitan Bank against the Mastins,) in this mortgage; and the *security* (of the mortgage) as between the sureties, (Johnson & Crawford,) and the debtors, (the Mastins,) as *still subsisting and unextinguished;* and by paying the debt of The Mastin Bank to the Metropolitan Bank who held the mortgage of the Mastins as security for it, they were entitled to have an *assignment* of the mortgage, *independently* of the actual assignment made to Underwood, for their benefit, by the Metropolitan National Bank.

Story's Eq. Jurisp., (10th Ed.) Sec. 499.
Ibid., Secs. 635, 636, 638, 639.
Snell's Principles of Equity, (Am. Ed.) p. 420.
3 Pomeroy's Eq., Sec. 1419.

2. And *generally* where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor, or in *the place* of the creditor, such person *will be so substituted.*

Yaple v. Stephens, 36 Kans. 680.
Ferguson v. Carson, 86 Mo. at p. 679.
Cowgill v. Linville, 20 Mo. App. at p. 147.
Shutts v. Finger, (N. Y.) 1 Cent. Rep. 731.
Adams' Eq., (4 Am. Ed.) 576, note 1.
Story's Eq. Jurisp., (8 Ed.) Sec. 499 b., note 3.
1 Leading Cases in Eq., (Hare & W. notes) 110.

Furnald v. Bank, 44 Mo. 336.
Allison v. Sutherland, 50 Mo. 277
Miller's Appeal, 119 Penn. 620.
Woodward v. Am. Express Co., 39 La. Ann. 566.
Johnson v. Barrett, 117 Ind. 551.
Penn v. Ingles, 82 Virginia 65.
Knablach v. Foglesong, 37 Minn. 320.
Arnold v. Green, 116 N. Y. 566.
Cockran v. West, 122 Indiana 372.
Keel v. Levy, (Oregon.) 24 Pac. Rep. 253.
Crippen v. Chappel, 35 Kans. 495, and cases cited.
Bender v. George, 92 Pa. 36.
Sheldon on Subrogation, Secs. 8, 87, 247.
1 Jones on Mortgages, Sec. 874.
Boone on Mortgages, Secs. 135, 136.
3 Pomeroy's Eq. Jurisp., Sec. 1212.
Freeman on Void Judl. Sales, Secs. 50, 51.
Miller v. Sawyer, 30 Vermont, 412.
Skipp v. Cross, 21 Iowa 459.
Lewis v. Palmer, 28 N. Y. 271.
R. R. Co. v. Trimble, 51 Md. 59.
5 Wait's Actions and Defenses, 213.
Levy v. Martin, 48 Wisc. 205.
Blodgett v. Hitt, 29 Ibid. 169.
Pain v. Hathaway, 3 Vermont, 212.
Dixon on Subrogation, 165.
Ins. Co. v. Marshall, 32 N. J. (Eq.) 112.
Gilbert v. Gilbert, 39 Iowa, 657.
Hines v. Potts, 56 Mississippi, 350.
Carter v. Taylor, 40 Tenn. 30.
Lockwood v. Marsh, 3 Nevada, 138.
Fulton v. Hollis, 57 Ala. 435.

Mitchell v. Butt, 45 Ga. 162.
Morgan v. Hammett, 23 Wisc. 41.
Goswiter's Estate, Penrose & Watts. (Pa.) 200.

Note. The right of subrogation exists where, *from all the circumstances of the case*, it ought in equity and good conscience to exist.

Mosier's Appeal, 56 Pa. St. 76.
Shotwell v. Ins. Co., 5 Bos. 263.
Kenrochan v. Ins. Co., 17 N. Y. 428.
Goswiter's Estate, 3 Penrose & W. (Pa.) 200.

This is such a case.

3. A person making a payment of a debt secured by mortgage can be *subrogated to the rights* of the mortgagee, by showing that he made the payment *at the request of the mortgagor*, or to *protect some interest he had of his own*, at the time of payment.

Norton vs. Highleyman, 88 Mo. at p. 624.
Miller's Appeal, 119 Penn. 620.
McNiel vs. Miller, 29 W. Virginia 480.
Baker vs. Baker (S. Dak.), 49 N. W. Rep. 1054.

4. If a third party pay the entire debt, *in pursuance of an agreement* between him and the debtor, he may, by virtue of such agreement, be *subrogated to the creditor's rights*, and *stand in the creditor's*

place as to all persons interested in the property or the security.

Field vs. Zuber, 67 Texas 275.
Bowen vs. Barksdale (So. Car.), 11 S. E. Rep. 640.
N. O. Nat'l. Bk. vs. Eagle Warehouse Co., 43 La. Ann. 9 So. Rep. 442.
Crippen vs Chappel, 35 Kansas 500.
Dillon vs Kaufman, 58 Texas 696.
Flanagan vs. Cushman, 48 Ibid. 241.
Fuller vs Hollis, 57 Ala. 435.
Mitchell vs. Butt, 45 Ga. 162.
R. R. vs. Wostendyke, 27 N. J. (Eq.) 658.
Morgan vs. Hammett, 23 Wis. 30-41.
Caudle vs. Murphy, 89 Ill. 352.
Temple vs. Ward, 102 Ibid. 29.

5. Subrogation is the substitution of another person in the place of the creditor, so that the person substituted will *succeed to all the rights of the creditor*, having reference to a debt due him. It is independent of any merely contractual relations between the parties to be affected by it, and is *broad enough to cover every instance* in which one party is required to pay a debt for which another is *primarily answerable*, and which in *equity and conscience ought to be* discharged by the latter.

Johnson vs. Barrett, 117 Indiana 551.
Marine Ins. Co. vs. R. R., 41 Fed. Rep. 643.
Miller vs. Stout, 5 Del. Ch. 259.
Philbrick vs. Shaw, 61 New Hamp. 356.

Arnold vs. Green, 119 N. Y. 566.
Hayes vs. Ward, 4 Johns. Ch. (N. Y.) 123.
Meade vs. Grigsby, 26 Gratt. (Va.) 622.
Penn vs. Ingles, 82 Va. 79.
Bender vs. George, 92 Penn. 39.
McNeil vs. Miller, 29 W. Va. 483.

6. Mere payment of a debt by the surety *operates as an assignment of it* to the party paying, with all the rights and liens attached to it as incidents in the hands of the creditors.

Benne vs. Schnecko, 100 Mo. 250.
Bispham's Prin. Eq., Sects. 335, 336.
Brandt on Suretyship, Sects. 269, 271.
Furnold vs. Bank, 44 Mo. 336.
Berthold vs Berthold, 26 Mo. 557.

7. On foreclosing a mortgage, where a surety has paid *part of the debt*, he is entitled to *stand in* the mortgagee's place for such payments, as to any remainder of proceeds of sale after the mortgagee is paid the balance due.

Bowen vs. Barksdale (So. Car.) 11 S. E. Rep. 640.

8. One of two sureties, *jointly* liable to a bank is not entitled to enforce a security given the bank by the other surety, *until he has paid the amount due the bank from the latter*, and *then* he becomes entitled to no other rights *than those enjoyed by the bank*.

Burton vs. Brent (Va.), 13 S. E. Rep. 29.

9. Where two persons are equally liable to the creditor, if, *as between themselves*, there is a superior obligation resting on one to pay the debt, the other, after paying it, may use the creditor's security to obtain reimbursement. The doctrine of subrogation does not depend on privity, nor is it confined to cases of strict suretyship. It is a means which equity adopts to *compel the ultimate discharge* of the debt by him, who, in good conscience, ought to pay it, and relieve him whom *none but the creditor could ask to pay*.

Bender vs. George, 92 Penn. 39.
Harris on Subrogation, Sec. 1.
Barnes v. Mott, 64 N. Y. 397.
Stevens v. Goodenough, 26 Vt. 678.
Smith v. Conn, 42 Conn. 244.
Johnson v. Zink, 51 N. Y. 333.
Cole v. Malcolm, 66 Id. 363.
Twombley v. Cassidy, 82 Id. 155.
Gans v. Thiene, 93 Id. 225.
Averill v. Taylor, 8 Id. 44.

10. Where the directors of a bank have intrusted to and devolved upon *its officers* the entire management of the affairs of the bank, and *such officers* are for all practical and business purposes THE BANK, and this with the knowledge and approval of the directors, their acts are binding alike upon the corporation and its stockholders.

Washington Sav. Bk. vs. Butchers & Drovers Bk. *per Black, J., Sup. Ct. Mo.*, 34 *Cent. Law Journal, No. 6*, p. 112. Feby. 5. 1892.

III.—CONSIDERATION.

1. A consideration sufficient to support a contract, my be defined to be, either a *benefit* accruing to the promisor, or a *loss* or disadvantage sustained by the promisee.

Day v. Gardner, (N. J.) 5 Cent. Rep. 631.
Churchill v. Bradley, (Vermont.) 2 N. E. Rep. 491.
Given v. Corse, 20 Mo. App. 132.
Columbus v. Col. St. Ry. Co., (Ohio,) 12 N. E. Rep. 531.
Traphagen v. Voorhees, (N. J.) 12 Atl. Rep. 895.
Devermon v. Shaw, (Md.) 14 Atl. Rep. 464.
New Hanover Bk. v. Bridgers, 98 No. Car. 67.
Townsley v. Sumrall, 2 Peters (U. S.) 182
United States v. Linn, 15 Peters (U. S.) 314.
2 Sharswood's Bk. Comm., 143.
Platt v. United States, 22 Wall. (U. S.) 507.
Currie v. Minn. L. R., 10 Exchqr. R. 162.
Hendrick v. Lindsay, 93 U. S. 148.
Natl. Bk. Rep. v. Brooklyn, 102 U. S. 46.
Dyer v. McPhee, 6 Colo. 193.
Clark v. Sigourney, 17 Conn. 517.
Flanagan v. Kilcome, 58 New Hamp. 43.
Bishop Cont., Secs. 76–82.

Leake Cont., 18.
Story Cont., Sec. 22.
1 Wharton Cont., Sec. 493.
3 Am. & Engl. Encycl. Law—Contracts, p. 831 et seq. (Title considerations.)

Note. A compromise of a disputed claim, or the discontinuance of a suit already brought may uphold a promise although the demand was unfounded.

Jones v. Rittenhouse, 87 Ind. 348.
Bank v. Gentry, 5 Peters (U. S.) 98.
Grassell v. Lowden, 11 Ohio St. 349.
Adams v. Morton, 37 Iowa, 235.
Fleming v. Ramsey, 46 Pa. St. 232.
Feeter v. Weber, 78 N. Y. 334.
Miller v. Hawker, 66 Ills. 185.
Morris v. Monroe, 30 Ga. 630.
Trust Co. v. R. R., 29 Fed. Rep. 546.

2. Forbearance of equitable or legal rights is sufficient consideration for a contract, and will make it binding *although no benefit accrues* to the party contracting. And a waiver of any legal right on the request of another is a sufficient consideration or a promise.

Bowen v. Tipton, (Md.) 64 Md. at p. 288.
Harris v. Casaday, (Ind.) 5 West. Rep. 286.
Given v. Corse, 20 Mo. App. 132.
New Hanover Bk. v. Bridgers, 98 No. Car. 67.

St. Mark's Church v. Teed, 120 N. Y. 583.
Woodburn v. Woodburn, 126 Ills. 387.
Piper v. Foster, 121 Indiana, 407.
Allen v. Platt, 79 Iowa, 113.
Vogel v. Meyer, 23 Mo. App. 427.
Fuller v. Claflin, 51 Hun (N. Y.) 609.
Pillans v. Van Mierop, 3 Burr. 1673.
Violett v. Patton, 5 Cranch. (U. S.) 150.
Townsley v. Sumrall, 2 Peters (U. S.) 182.
United States v. Linn, 15 Peters (U. S.) 314.
3 Am. & Engl. Encycl. Law, 836, note 1.
Hewett v. Currier, 63 Wisconsin, 386.

3. The payment of a doubtful claim in full to prevent litigation will constitute a valuable consideration—but it is otherwise when the *amount* simply is in dispute, and no more was paid than was actually due.

Emmettsburg R. R. Co. v. Donoghue, 67 Md. 383.
Addison on Contracts, 11.
Hewett v. Currier, 63 Wisconsin, 386.
Grandin v. Grandin, 9 Atl. Rep. (N. J.) 736.
Miles v. New Zealand Etc. Co., 32 Ch. Div. 266.
3 Am. & Engl. Encycl. of Law, 837, note 1.

4. Mutual promises are a sufficient consideration to support a contract.

Prior v. Hunter, (Neb.) 48 N. W. Rep. 736.

5. The primary definition of the term consideration as related to contracts is, "that which the party to whom a promise is made, does or agrees to do, in exchange for the promise," per Gray, J., in Phœnix Life Ins. Co. v. Rabdin, 129 U. S. 197.

Anderson's Law Dict. Tit. Consid., 231.
2 Blackstone's Comm., 43.
Bishop Cont., Sec. 38.
Philpot v. Gruminger, 14 Wall. (U. S.) 577.
Wharton Cont., Sec. 493.
Pillans v. Van Mierop, 3 Burr. 1673.

6. If there is *any* consideration the court *will not weigh the extent or the value of it.*

Phillips v. Bateman, 16 East. 372.
Downing v. Funk, 3 Rawle. (Pa.) 60.
Hesser v. Steiner, 5 W. & S. (Pa.) 476.
Silvis v. Ely, 3 W. & S. (Pa.) 420.

6. The consideration for the Underwood agreement, *assuming the Mastins to be parties to it,* (although not formally signing it,) as appears *by all the evidence,* was ample both as to the Metropolitan Bank and the Mastins, *and both are bound by it.* The former received the money (page 47) for a debt secured by the mortgage, and the latter received the benefit of a payment made to the former at *their request,* and the dismissal of a suit against them by the former to which they (the Mastins) had no available defense, (pages 48, 49,) besides the fact of a disputed liability and circumstances making them interested in the settlement of claims

against them and affecting their interests, (pages 46–47).

IV.—ESTOPPEL.

These parties, the Mastins, are estopped by their conduct, both in the making of the Underwood agreement, and otherwise,—and both before and after that agreement. They induced these appellants to pay an admitted liability—which, however, the Mastins were also liable for and had secured by this mortgage,—and agreed that as to another liability which, as between them and Johnson & Crawford, was disputed, that *it* should be made out of the mortgaged property (pages 46, 47,)—their liability to the Metropolitan Bank being absolute and also secured by this mortgage,—and *when this had been done* that these parties, Johnson & Crawford, should stand in the place of the Metropolitan Bank as to the mortgage security, and when this *was done* (page 48) and they had the benefit of it, and the dismissal of a suit against them (page 48)—and *five years of time*, during which it was always treated as a valid agreement, both by them and their attorneys (page 51)—under such circumstances it would be monstrous that they should be allowed to call it in question upon any grounds, technical or otherwise. Their obligation is not only one that the law sanctions and will *compel* them to perform, but it is one that equity regards as so sacred and urgent, as that it considers the assignment stipulated for by the Underwood agreement wrought out by operation of law; and enforcible *independently of agreement*.

V.—RELATIONS OF THE MASTINS TO THE MASTIN BANK.

The Mastins are not in the position of strangers as to The Mastin Bank, being Stockholders, Directors and Managing officers, and in their relations to it (The Mastin Bank), are practically the bank itself—especially in transactions made when it was insolvent, and within a few days of its making an assignment (pages 61-65). And they *have so acted*, both as to the Metropolitan Bank, by giving a mortgage of all their property to secure the indebtedness of The Mastin Bank to the Metropolitan Bank (pages 1, 38, 89); and as to these appellants by practically recognizing the failure of Consideration of the note given for the Certificate of Deposit as a failure of Consideration as to themselves, and agreeing to a settlement accordingly out of the mortgaged property (pages 46-51). If they had paid this note and sued the makers, they could never have recovered from these plaintiffs, in view of all the circumstances attending the issuance of the certificate of deposit, and their connection with and relation to it (pages 46-57).

> Washington Sav'gs. Bk. vs. Butchers and Drovers Bk. (Sup. Ct. Mo. *for Black J.*) 34 Cent'l. Law Journal No. 6, p. 112, Feb. 5, 1892 (106 or 107 Mo).

VI.—SUMMARY REVIEW OF *the merits* PRESENTED BY APPELLANTS.

The claim of the appellants who are the interven-

ors and practically the plaintiffs against both the Mastins and the Metropolitan National Bank, who are practically the defendants, (since the controversy between that Bank, who is the mortgagee, and the Mastins, who are the mortgagors, has been settled by a deed of release as *between themselves,*) is based upon the highest equity, and appeals most strongly to the uttermost exercise of the exalted prerogatives belonging to Courts entrusted with the administration of justice. It is also supported by the adjudications of this Court, since its organization; and of the State Courts, and of the English Courts, and by the best text-writers on both sides of the Atlantic. And last, but not least, it commends itself by its intrinsic merits.

Let it be considered *as of the time of the Underwood agreement,* with all the attendant circumstances. The Mastin Bank had been the holder of these two notes, and had gotten the money for them from the Metropolitan National Bank, by its own indorsement and that of the Mastins. *They* (the Mastins) had secured the payment of these notes, (with other notes,) by mortgaging large property in two states—Missouri and Kansas. Within two weeks after the giving of these notes, The Mastin Bank made an assignment for the benefit of its creditors, under the laws of Missouri. Subsequently, the mortgage made to the Metropolitan Bank was recorded, and proceedings for its foreclosure *were pending* in the Circuit Court of the United States, for both of these states, *at the time of this agreement.* Suit was also pending on one of these notes in the same Court, (in Missouri,) that for 10,000 dollars, to which the Mastins were parties defendant, with no available

defense as against the Metropolitan National Bank.

The consideration of *this note* was a *Certificate of Deposit* issued by The Mastin Bank within two weeks of the time it made this assignment, *and when it was insolvent.* The holder of it was asked to take it in the place of money and did so; but was uneasy about it on the very next day, so that the makers and indorsers *of this note* to The Mastin Bank, indorsed the certificate of deposit in order to satisfy him, and upon the refusal of the Assignee of The Mastin Bank to pay it at its maturity *paid to the holder every cent called for by it.* After doing this they called upon the Mastins, who were officers and stockholders and practically the Bank, to agree that the *mortgaged property* held by the Metropolitan Bank, should be applied to the payment of *this* note, (which was *then* secured by the mortgage) inasmuch as The Mastin Bank and the Mastins had discounted the note and *received the money for it*; and they, the makers, had gotten nothing for it except the certificate of deposit, issued instead of money, which they had paid to the holder as the sureties of The Mastin Bank by indorsement; offering to pay and *actually paying* the other and larger note for which there was a real consideration. This *was agreed to* by the Mastins, and recognized for a year; but when the note was sued upon, they (the Mastins) made no defense, and although *this agreement* was pleaded it was not available as against the Metropolitan Bank, and judgment against *all parties, including the Mastins,* was imminent and *inevitable.* It was *under these circumstances* that the Underwood agreement was made. By it *all the dividends* received from The Mastin Bank, *even on the Certi-*

ficate of Deposit, (which was held by the makers of this note *after paying* it to the holder,) were applied to the *payment of this note* to the Metropolitan Bank, and the *balance* remaining due upon it *was paid*; and the note *assigned* to Underwood by the Metropolitan Bank; and the *Court Costs* of the suit by Metropolitan Bank against all the parties, *including the Mastins*, were paid; and *the suit was dismissed*; *all in pursuance of this agreement* and in *performance of the agreement made one year before*. And for five years this agreement was treated as effectual and subsisting,—the subsequent dividends belonging to the intervenors, except for this agreement, were accounted for to the Mastins (by their attorneys, who wrote the agreement for them, and have always treated it as subsisting), and were received and appropriated by them. Then, for the first time for seven years, they, the Mastins, deny all liability to the Metropolitan Bank and *repudiate* the agreement made with Underwood (in behalf of the intervenors), upon the pitiful plea that they had not formally *signed it*, (although they had *written it*, by their attorneys,) and that at all events there was *no consideration for it*. Soon after this their old friend, "the enemy"—the Metropolitan National Bank of New York—releases all *its* claim under the mortgage, and leaves it for us to show what our claim is against it, and them, both under and independently of the agreement to which both it and the Mastins were parties.

This record presents the issues, and the evidence produced by us in support of our claim, as well as theirs in defense, if it can be called a defense. Pleas as to jurisdiction, citizenship, statute of

frauds—no consideration seems to be its staple; no suggestion of merits, except *denials* disproved, and *except* the suggestion, made in mockery, that we have only *paid our own note*, and have *extinguished our own debt*.

It is true that we have done the first, and we have also *paid their debt not only* to the holder of the certificate of deposit,—(which they imposed on him for money when The Mastin Bank was insolvent, and which would have been demanded of that bank the next day except for our indorsement,) but also *to the Metropolitan Bank*, which they themselves had secured by the mortgaged property. But we *did not extinguish* our own debt, either formally or informally, nor did we extinguish *their debt* to the Metropolitan Bank by the payment of *this note*, on the basis of the Underwood agreement *made by them* and *under their direction*, and with the explicit consent of the Metropolitan Bank, nor did *they or we* ever think of or *intend* such a result; nor can anything done under it justify such a claim for a moment. The law cannot be prostituted to such a result as this; it would writhe itself out from under such a monstrous conclusion; its lips could not be so distorted as to deliver such a message; its tongue would be paralyzed. The representative and apostle of the divine truth may not always see *all the truth*, but it *cannot avert its eyes* from such as is presented to it, and this is all we ask of it here.

JAS. F. MISTER,
WALLACE PRATT,
For the Appellants.

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In the Supreme Court of the United States.

OCTOBER TERM, 1891

TERM NO. 270.

F. L. UNDERWOOD, JESSE N. JOHNSON, Administrator of A. H. Johnson, deceased, and A R. CRAWFORD,
Appellants,
vs.
THE METROPOLITAN NATIONAL BANK OF THE CITY OF NEW YORK, JOHN J. MASTIN & THOMAS H. MASTIN,
Respondents.

STATEMENT AND BRIEF OF RESPONDENTS.

STATEMENT.

The Mastin Bank, which was incorporated under the laws of Missouri, made an assignment August 3, 1878 (p. 4), when it became insolvent, or what caused it the evidence does not show. John J. Mastin & Co. were a firm, composed of John J and Thomas H. Mastin. The first was cashier and the latter assistant cashier of that bank. Both were stockholders and directors (p 75); what their duties were as officers, or how much stock they held the record does not disclose. The Mastin Bank discounted with the Metropolitan Bank of New York, from time to time, and at the time the bank failed, it was liable on account of its en-

dorsements on said discounts for more than $200,000 (p. 83).

The firm of John J. Mastin & Co. endorsed all of the papers so discounted for the accommodation of the Mastin Bank (pp. 77, 79, 85).

To secure said endorsements of the bank, John J. Mastin and Thomas H. Mastin, on June 7, 1878, executed a mortgage to the Metropolitan National Bank upon lands owned by them in Missouri and Kansas (p. 89). The condition of said mortgage reads as follows (pp. 40, 91): "To have and to hold the said described real estate, with all the rights, privileges and appurtenances thereto belonging unto the said Metropolitan National Bank of New York, its assigns and successors forever, and upon this express condition; whereas the Mastin Bank of Kansas City, Missouri, is indebted to said Metropolitan National Bank as endorser on various notes, drafts and bills, which the said Mastin Bank has sold to said Metropolitan National Bank; now therefore, *if the said Mastin Bank, its assigns or successors* shall pay or cause to be paid all notes, drafts and bills so sold to the said Metropolitan National Bank and shall pay or cause to be paid all notes, drafts and bills, so sold to the said Metropolitan National Bank and shall pay or cause to be paid all notes, drafts and bills, which the said bank may hereafter sell and endorse to the said Metropolitan National Bank, then this conveyance shall be void; otherwise in full force and virtue at law

In witness whereof, we have hereunto set our hands and affixed our seals this 7th day of June, 1878.

JOHN J. MASTIN,
THOS. H. MASTIN,
ELIZABETH S. MASTIN,
JULIA MASTIN."

After the failure, the Metropolitan National Bank brought a suit to foreclose; the Mastins never questioned the validity of the mortgage.

Among the notes so discounted were two notes, executed by Johnson & Crawford, a firm composed of A. H.

Johnson and F. R. Crawford. The firm bought a bunch of cattle from one Baer and, to do so, they got from the Mastin Bank about eleven thousand dollars in cash, for which they gave one of these notes (about which there never was any question), and the said bank issued a certificate of deposit to Baer for which they gave the other (p 61).

The said certificate reads as follows: No. 4945, Kansas City, Mo., July 18, 1878. G. Baer has deposited in the Mastin Bank, Kansas City, Mo., ten thousand dollars payable in currency to the order of himself on return of this certificate, properly endorsed, thirty days after date, payable in New York exchange.

$10,0000. JOHN J. MASTIN, Cashier.

Countersigned: W. H. WINANTS, Tel" (p. 7)

The note given for this certificate reads as follows:

$10,000. "KANSAS CITY, Mo., July 18, 1878.

Thirty days after date we promise to pay to the order of Quinlan, Montgomery & Co., ten thousand dollars at Metropolitan Nat. Bank, New York, value received.

No. 11529. JOHNSON & CRAWFORD."

Endorsed as follows:

"Quinlan, Montgomery & Co., John J. Mastin & Co. Pay Metropolitan National Bank, New York. The Mastin Bank by John J. Mastin, Cash." (p. 69).

This certificate of deposit was given Baer as part payment for the cattle (p. 61).

Shortly after Baer got the certificate, he became a little uneasy about it, and wished Johnson & Crawford, and Quinlan, Montgomery & Co. to endorse it, which they did (pp. 62, 67)

Before the certificate was payable, the bank failed. Johnson & Crawford afterwards paid it to Baer (p. 62).

The two notes were allowed by the assignee of the Mastin Bank, who paid the Metropolitan National Bank upon the same, dividends amounting to $4,122.08 (pp. 72, 80 and 81).

The certificate was allowed by the assignee, who paid Johnson & Crawford all the dividends upon the same, except the last one, which was not paid, because the assignee had paid dividends upon the said notes to the holder thereof, they thereby receiving the benefit of the same (pp. 46, 47, 80 and 81)

In September, 1879, the Metropolitan National Bank sued upon the Johnson & Crawford note, which was given for said certificate of deposit. On October 21, 1880, F. L. Underwood, for Johnson & Crawford, paid the balance due on said note (p. 47). This was paid by Underwood with the money of Johnson & Crawford. He gave them a writing which reads as follows (p 74):

"KANSAS CITY, MO., Oct. 22, 1880.

I have this day bought with the money of A.W. Johnson and C. C. Quinlan a claim based on note of Johnson & Crawford for $10,000, endorsed by Quinlan, Montgomery & Co. and J. J. and T. H. Mastin, on which certain payments have been made by the dividends of the Mastin Bank. This claim is in suit against Mastins in the hands of Karnes & Ess and said Johnson & Quinlan are entitled to the said claim and all dividends made upon it and this shall operate as an assignment of said claim

F. L. UNDERWOOD."

Quinlan says (p. 67) he furnished a part of the money, which he charged to Crawford, who says (p 63) that he repaid it.

When the payment was made the following agreement was executed.

This agreement made and entered into this 20th day of October (1880), by and between the Metropolitan National Bank of New York, party of the first part and F L. Underwood, party of the second part, witnesseth:

First That the said party of the first part, as endorsee from the Mastin Bank of Kansas City, Mo., is the owner and holder, a certain promissory note executed by Johnson & Crawford to Quinlan, Montgomery & Co. and by said Quinlan, Montgomery & Co. endorsed, and upon which said

note there is a balance due of principal and interest at this date of $7.603.50 and for which suit is now pending in the Circuit Court of the United States at Kansas City.

Second. On said note John J. Mastin and Thos. H. Mastin are also endorsers and to secure the payment of the same with other liabilities said Mastins executed to said party of the first part a mortgage on certain real estate in Missouri and Kansas, and to foreclose said mortgage, suits are now pending, one in the Circuit Court of the United States Court at Kansas City, Mo., and one in the Circuit Court of the United States at Topeka Kansas.

Third. For and in consideration of the sum of $7.603.50 paid to said party of the first part by said party of the second part, and the payment of all costs in said suit therein, said note so executed by said Johnson & Crawford has this day been assigned and transferred without recourse to said party of the second part.

Fourth. It is also further agreed as a part of said assignment and transfer that the said party of the second part shall release and hereby releases all claim or interest in so much of said mortgage as covers the real estate therein described and lying in the State of Kansas; but as to the land in the State of Missouri and covered by said mortgage, the said party of the second part shall retain his interest therein in consideration of the release of the Kansas lands as aforesaid; and the said party of the first part stipulates and agrees that in said foreclosure proceedings in Missouri, it will file a supplemental bill showing this assignment of said note and to which said party of the second part agrees to enter his appearance and make proper answer or plea thereto, so that the same may be determined as a part of said foreclosure and so that said party of the second part may obtain such orders as he may deem necessary and proper to obtain a *pro rata* division of the proceeds arising from the decree of foreclosure.

Fifth. In all matters pertaining to said martgage whether by foreclosure or otherwise, it is agreed by and be-

tween the parties hereto that the same shall be managed exclusively by said party of the first part without any interference or hindrance by said party of the second part. Provided however, that nothing shall be done to impair or affect the right of said party of the second part to receive his *pro rata* share of whatever sum may be realized by the foreclosurer or otherwise from the Missouri lands.

Sixth. It is also further agreed by and between the parties hereto that except as to the Kansas land so released as hereinbefore recited said party of the second part shall be entitled to received on said note a *pro rata* share on any other security held by said party of the first part for this and other indebtedness of said John J. Mastin and Thomas H. Mastin.

Executed in duplicate the day and year aforesaid.

THE METROPOLITAN NATIONAL BANK
OF NEW YORK,
BY KARNES & ESS, Att'ys
F. L. UNDERWOOD." (p. 75)

The Metropolitan National Bank, on February 1, 1886, filed its supplemental bill (p. 17), alleging, among other things, that since the filing of the original bill, Underwood, Crawford & Johnson claim to have acquired an interest in the subject matter of the suit and in the mortgaged premises.

It prays that they may be made parties defendant and that they may be required to answer.

Upon the 18th day of February, 1886, they file answer (p 24). John J. Mastin & Thomas H. Mastin plead thereto October 29, 1886 (p. 31)

The said mortgage was released by the Metropolitan National Bank, by its deed of release dated May 18, 1886 (p. 35).

Mr. Karnes, who testified for appellants, says (p 47): "When the Mastin Bank failed these re-discounts held by the Metropolitan and which were sent to us for allowance amounted to over $200,000. The Metropolitan National Bank held a general mortgage on all the property of John J. and Thomas H. Mastin in the State of Missouri and the

State of Kansas to protect this paper. When these claims were allowed and the condition of the bank was ascertained, it was supposed that it would be necessary for the Metropolitan to look to this real estate for the payment of a large part of these re discounts. In the years 1879 and 1880, nothing else was contemplated but that this real estate of the Mastins would all be swallowed up in the payment of this paper under this mortgage. This being the view that was taken, Johnson & Crawford and Quinlan, Montgomery & Co., and the Mastins, one or both of them, had interviews at our office, in which it was fully talked over that all this real estate would be swept away, anyhow, and Johnson & Crawford and Quinlan Montgomery & Co. insisted that inasmuch as they had never received any consideration for this note, as the certificate of deposit had not been paid, that this note should be collected through this mortgage, off of this real estate."

Again he says (p. 48): "All these matters in connection with this Johnson & Crawford controversy were quite protracted and were talked over at different places at different times. I remember distinctly of the parties being together several times at our office and I would not be able to say who was present at any particular meeting, but I feel sure of this, that everything that was done in connection with this paper was done with the approval of either one or both of the Mastins In all of the business in connection with this bank John J. and Thomas H. Mastin, have always stood very close together, and out of the hundreds of business transactions, it was always entirely immaterial whether an arrangement was made with one, or both of them; it was always satisfactory to the other; and speaking in that way, I never charged my mind, in any given transaction to know whether the agreement was made with both of them or with only one, and I could not say in this case, whether both of them were present or whether both of them were consulted, but I know one of them was, although I would not be able to say which one."

Thomas H. Mastin says (p. 77):

Q. What, if anything, do you know about an agreement alleged, in the cross-bill of Johnson & Crawford, to have been made by which the smaller of these two notes was to be paid out of the proceeds of the land mortgaged by John J. & Thomas H. Mastin to the Metropolitan National Bank and under that mortgage? A. I understood that Johnson & Crawford were in a very angry mood soon after the failure of the Mastin Bank on account of these notes and that John J. Mastin had said to Quinlan that these notes were endorsed by John J. Mastin & Co., and that that endorsement was secured by a mortgage on our property in Jackson County and on property in the state of Kansas, and that the notes would be paid out of the security.

Q. Do you know of any other or further agreement than this? A. This is all I know of the agreement in reference to these notes.

Q. Did you personally make any agreement either with Johnson & Crawford or with Karnes & Ess for the Metropolitan National Bank in regard to this matter? A. I never did.

John J. Mastin says (p. 82): "I don't remember that I ever had any conversation with Johnson & Crawford with regard to the matter at all. I did have conversation, one or more, with Judge Quinlan in regard to this note, but as to just what was said or the language that was used, I haven't any recollection. Before the execution of this note by Johnson & Crawford I had made the Metropolitan National Bank a mortgage on certain real estate in this state and in the state of Kansas to secure the payment of the paper I had endorsed for the Mastin Bank, which the Metropolitan National Bank had discounted or might discount thereafter, and, while I don't remember what was said to Judge Quinlan in regard to this note, I expect it was the understanding that the property that was mortgaged to the Metropolitan National Bank would be disposed of or sold and the pro-

ceeds applied to the payment of the paper that the Metropolitan Bank had discounted for the Mastin Bank."

Q. (p. 83). Did you make any other agreement with Quinlan or Johnson & Crawford, or have any other understanding with them in regard to this matter, further than telling them that the property mortgaged to the Metropolitan National Bank would be sold and the notes paid out of the proceeds? A. I didn't make any agreement. My impression was, as before stated, that the property would be sold and I supposed that the proceeds would be applied to the payment of the notes that were endorsed by John J. Mastin & Co., and no doubt so stated to him."

BRIEF.

I.

Appellants seek to be subrogated to the rights of a mortgagee under these circumstances. They are the makers of a negotiable promissory note which was sold by one bank to another, and the mortgage was made by third parties to the purchaser solely to secure the endorsement of the seller.

"Subrogation is a mode which equity adopts to compel the ultimate discharge of a debt by him who in good conscience, ought to pay it and to relieve him whom none but the creditor can ask to pay."

Miller vs. Stout, 5 Del. Ch., 261.
Arnold vs. Green, 116 N. Y., 571.

"Subrogation is a right arising in pure equity and benevolence. It is an equitable result and depends like other controversies in equity on facts to develop its necessity in order that justice may be done. To entitle a party

to subrogation, his equity must be strong and his case clear."

Forest Oil Co.'s Appeal, 118 Pa., 145.

"To entitle a party to subrogation, his equity must be strong and the case clear. In such applications, great care should be taken by the court, that the subrogation will work no injustice to the rights of others. And it will never be allowed where the equity of the party seeking it is no stronger than the equity of the party affected by it."

Knonf's Appeal, 91 Pa., 82.

II.

The debt on account of which appellants claim subrogation, was their own debt; they were primarily liable for it; no others were bound for it, except as endorsers; when they paid the note which they made, they paid their debt; it was paid not by a third party but by themselves. They seek to be subrogated to a mortgage, given to the bank to which they owed the debt, by accommodation endorsers to secure another endorsement.

Again, because of the payment of the note by appellants, the conditions of the mortgage were not broken; this payment, which appellants claim confers the right to foreclose, has rendered it impossible for the conditions of the mortgage to be broken as to this note.

Their claim, in other words, is, that the payment by the debtor of the debt, to secure which the mortgage was given, instead of satisfying the mortgage, is a breach which will sustain a foreclosure.

"Before a third party, making payment of a debt secured by mortgage can be subrogated to the rights of the

mortgagee, he must show, either that he made the payment at the request of the mortgagor, or to protect some interest he had of his own at the time of the payment."

Norton vs. Heighleyman, 88 Mo., 624.
Allen vs. Dermott, 80 Mo., 59.

Subrogation "is an equity called into existence for the purpose of enabling a party, secondarily liable, but who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor and by use of which the party paying, may thus be made whole."

Forest Oil Co.'s Appeal, 118 Pa., 145.

It is of the essence of legal subrogation that the person making payment should be a third person in respect to the obligee of the debt, he is seeking to prime thereby and that he should himself be a creditor of inferior rank of the common debtor whose debt he pays.

N. O. National Bank vs. Eagle Cotton Warehouse & Compress Co., et al., 43 La. An. (May 16, 1891) 9 Southern R 442.

"The familiar doctrine of subrogation is, that when one has been compelled to pay a debt, which ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possessed against that other. To the creditor, both may have been equally liable, but if as between themselves, there is a superior obligation, resting on one to pay the debt, the other, after paying it, may use

the creditor's security to obtain re-imbursement. The reason why subrogation is not allowed to one partner as against his co-partner or to one merely a joint debtor as against his co-debtor, is because that, as between them, there is no obligation to pay the debt, resting upon one, superior to that which rests upon the other. The doctrine does not depend upon privity, nor is it confined to cases of strict suretyship. It is a mode which equity adopts to compel the ultimate payment of the debt by him, who in good conscience ought to pay it and to relieve him whom none but the creditor could ask to pay. To effect this, the latter is allowed to take the place of the creditor and make use of all the creditor's securities, as if they were his own."

McCormick's Adm'r. vs. Irwin, 35 Pa. St., 117.

"Legal substitution into the rights of a creditor, for the benefit of a third person, takes place only for his benefit, who being himself a creditor, satisfies the lien of a prior creditor or for the benefit of a purchaser who extinguishes the encumbrances upon his estate, or of a co-obligor or surety, who discharges the debt, or of an heir who pays the debts of the succession.

The principle of legal substitution, as adopted and applied in our system of equity has it is believed, been rigidly restrained within these limits."

Shinn vs. Budd, 14 N. J. Eq., 237.

Quoted with approval in Aetna Life Ins. Co. vs. Middleport, 124 U. S., 550:

"Ordinarily it is only when a person pays the debt of another at his instance, or is compelled to pay to protect

his own, or stands in the relation of a surety that he will be subrogated to the rights of the creditor."

Evans vs. Halleck, 83 Mo., 376.

The right of subrogation is a derivative one and comes from the one in whose place he asks to be placed, but if his right is such as cannot be transferred to the one seeking the transfer there can be no subrogation.

Platt vs. The Richmond, &c., Railroad Company, 108 N. Y., 358.

"If the money is advanced by one whose duty it is, by contract, or otherwise to pay and cancel the mortgage and relieve the mortgaged premises of the lien, a duty in the proper performance of which others have an interest, it shall be held to be a release and not an assignment, although in form it purports to be an assignment."

Brown vs. Lapham, 5 Cush., 554.

Appellants, to support their position, cannot rely upon cases where vendors selling land, with a mortgage upon it, which the vendee assumes, are subrogated to the rights of the mortgagee, no withstanding they are the makers of the note, if they are compelled to pay it.

Where land is conveyed subject to a mortgage, or where the vendee assumes the mortgage, the vendee gets simply an equity of redemption. In equity, by the transaction the land is made the primary fund for the payment of the debt, and the vendee is simply surety therefor. The vendee has no right to the premises freed from the encum-

brance and it would be inequitable that he should get it so freed; hence it is that, if he pays it, he is subrogated to the rights of the mortgagee.

Johnson vs. Zink, 51 N. Y., 336.

Nor can appellants rely upon another class of cases where subrogation is allowed. It is illustrated by Miller's appeal, 119 Pa., 631, where the court says: "The rule embraces purchasers in common of an estate bound by a joint lien. As between themselves, the purpart of each is liable to contribute only its proportion towards the discharge of the common burden and beyond this, is to be regarded simply as the surety of the remaining purparts In this respect they are to be treated as the several estates of joint debtors, one being surety of the other; and if the purpart of the one is called on to pay more than its due proportion, the tenant or his lien creditors are entitled to stand in the place of the satisfied creditor to the extent of the excess which ought to have been paid out of the other shares"

III.

Appellants may say that the subrogation, they claim, is purely conventional. That it is derived from the agreement copied into their pleading and that without it they have no rights.

But this contract is between "The Metropolitan National Bank of New York, party of the first part and F. L. Underwood, party of the second part." Said second party is these appellants. The Mastins are not named in it as parties; they have not even signed it. It recites the balance due on the note; that second party has paid the balance, and that in consideration thereof, first party has has transferred to second party said note; that in considera-

tion of second party releasing all claim or interest "in so much of the mortgage as covers the real estate" in Kansas, said second party "shall retain his interest therein" as to the lands covered by the mortgage in Missouri. First party agrees to "file a supplemental bill showing *this assignment* of said note, to which said party of the second part agrees to enter his appearance and make proper answer or a plea thereto *so that the same may be determined* as a part of said foreclosure."

"The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties."

Memphis, &c., Railroad vs Dow, 120 U. S., 301.

Very often, the holder of a security, gets his money from a third party, delivering the security to him so as to keep it alive.

This class of cases is referred to in Fierel vs. Zuber, 67 Texas, 280, where the court says: "If any subrogation took place, therefore, it must have been by agreement of parties. That this can be accomplished by a payment made in accordance with an express understanding, between the debtor, the creditor and a third party to the effect, that if such third party pays the debt, he may hold the security for his re-imbursement there can be no doubt. It is also recognized law that a payment upon a like agreement between a stranger and the creditor will have the same effect. In both these cases, however, this would seem a virtual assignment without reference to the doctrine of subrogation." And the court quotes from Domat's Civil Law as follows (p. 281): "The manner of acquiring the rights of a creditor, without his substitution is just and equitable in order to facilitate the payment of debts. It is but

just that the debtors themselves should have the power to put in place of the creditors those who pay for them, since nobody receives prejudice thereby and since it is the interest of the debtor that he should have the power of making his condition easier by changing his creditor."

Appellants are playing the part of strangers as to paper, to which they never have sustained any relation, except that of makers; they ask to be regarded as such, when they paid it, so as to get the benefit of a security, not given by themselves, but by others, who became known to the note, in an independent transaction, after it had been sent into the commercial world.

IV.

Even if it was possible to claim that the appellants were sureties for the Mastins, then no writing was necessary to subrogate them to the rights of the Metropolitan National Bank.

"When a surety or guarantor pays a debt of a principal, equity substitutes him, in the place of a creditor, as a matter of course, without any special agreement to that effect."

Miller vs. Stout, 5 Del. Ch., 261.

But at the date of the writing, it seems it had not then occurred to appellants, that they were sureties for the Mastins, for it recites that appellants were the makers and the Mastins, endorsers.

Appellants endorsed the certificate of deposit of the Mastin Bank issued to Baer, after it was delivered to him. They neither did so at the instance of the bank nor of the Mastins. The Mastins were not in any way parties to the certificate. The endorsement and payment of the certif-

icate by appellants were purely voluntary. They were not obliged to do it and received no consideration for so doing. It may be they thought they ran no risk and possibly they were morally bound to do so, yet certain it is they were not legally compelled to do it.

They seem to argue that when the Mastins endorsed the note of appellants, as accommodation endorsers of the Mastin Bank, they in law also endorsed in like manner the certificate of indebtedness As was said in Otis vs. Cullum, Receiver, 92 U. S, 447: "They are seeking to recover, as it were upon one, while none exists. * * * Not having taken it they cannot have the benefit of it."

V.

There was no compromise of any disputed claim by the agreement of the Metropolitan National Bank and Underwood. There was no dispute, as the bank was a *bona fide* purchaser of the note and it was not contended that it had even heard of the certificate of indebtedness issued to Baer. The agreement recognizes the validity of the debt due the bank. Appellants paid every cent of it and costs. There was no claim that the Mastins were liable in any way to the appellants. The agreement was simply a permit issued by the Metropolitan National Bank to appellants, to take a certain share of the proceeds of a sale of the Mastins' property under the mortgage.

It is true that the Mastins were benefited by the payment of the debt by the appellants, in the sense that an endorser is always benefited by the payment of the note by the maker. It is always a benefit to a security, to be released from any liability by the payment of the debt by those who owe it. In this way it can be said that the Mastins were benefited, by the payment of the note by the makers, so that the suit by the Metropolitan Bank against the appellants as makers, and the Mastins as endorsers, came to an end The doctrine of estoppel cannot be in-

voked by appellants. They were in no different position, after the agreement, than before. The most they can say is that they paid their debt voluntarily by reason of the agreement. Had they not done so, they would have been compelled to pay it under a judgment.

The Mastins received nothing, by reason of the agreement. They never got a cent of dividends. If appellants did not get all the dividends, to which they were entitled, that is a matter between them and the assignee of the Mastin Bank. Certain it is the Mastins did not get them.

But they did receive not only all, but more than the law allowed them. Dividends were paid the Metropolitan Bank from the assets of the Mastin Bank upon its allowance upon the notes of appellants. These sums should have been returned by them to the assignee. It was not done. After the balance due upon the notes of appellants was paid to the Metropolitan Bank, of course the assignee ceased to pay dividends on the allowance.

Appellants got the benefit of all the dividends paid upon the certificate of indebtedness, except the last one; the assignee did not pay that one, because they had already obtained more than their share of the assets of the Mastin Bank by the dividends which had been paid for their benefit, to the Metropolitan.

The Mastins in no event could declare any dividends; this was the business of the assignee. It is true they purchased the remaining assets of the Mastin Bank. This purchase money was the fund, from which the last dividend was paid. Appellants received no part of it, simply because they were not entitled to it. Whether they received it or not, was a matter in which the creditors of the Mastin Bank were alone interested.

So then we say that the contention of appellants is this, that a mortgage upon realty, executed by an accommodation endorser for the vendor of a note, to secure its endorsement, can be so enlarged by a writing between the maker and the said vendee, in consideration of the payment

of the note by the maker, so as to become security, for the payment of a certificate of indebtedness, the consideration of the note. As was said by Mr. Justice Brewer before whom this case was tried (p. 43), "to render a decree in favor of these cross complainants on the facts as described, would be simply the making by the court, of a contract for the parties, which they did not make and then enforcing that contract and that simply upon the ground that the court thinks that the parties ought to have done so."

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